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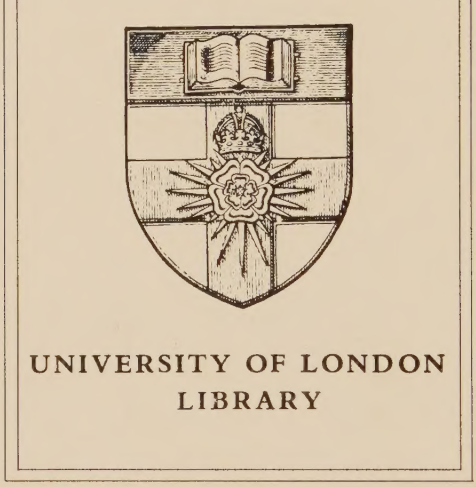

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AND IN

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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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C. A.
1912
Feb. 21, 22.

[1911 A. 681.]

Vendor and Purchaser—Contract—Title to commence with Devise in 1842—*Abstract from* 1842 *shewing Ouster of True Owner in* 1874—*Subsequent Good Possessory Title in Vendor—Title forced on Purchaser—Statute of Limitations—Real Property Limitation Act,* 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34—*Effect of.*

Where a vendor contracts to give a title commencing with a certain instrument, and it afterwards appears that he cannot give such a title, but can give a good possessory title from a later date, the possessory title will be forced upon the purchaser.

A contract for the sale of land in 1911 provided that the title should commence with a general devise contained in the will of a testator who died in 1842 and whose seisin was to be assumed. The vendor in fact derived title from a disseisor who, in 1874, under a mutual mistake as to the effect of the will, was allowed by the true owner, who was under no disability, to take possession of the land and title deeds. The disseisor and those claiming under her down to the vendor remained in uninterrupted possession to the date of the contract. The mistake was not realized at the date of the contract, so the fact that the title was partly possessory was not mentioned therein. The purchaser took out a summons for a declaration that the vendor had not shewn a good title in accordance with the contract. The vendor claimed to have shewn a good title up to 1874, and a good possessory title since that date:—

Held by the Court of Appeal (Cozens-Hardy M.R. and Buckley L.J.,

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Fletcher Moulton L.J. dissenting), that the vendor had shewn a good title and that it could be forced on the purchaser.

Decision of Swinfen Eady J. [1912] 1 Ch. 2, affirmed.

Games v. *Bonnor* (1884) 54 L. J. (Ch.) 517, followed.

Effect of s. 34 of the Real Property Limitation Act, 1833, explained.

Observations of Lord St. Leonards in *Scott* v. *Nixon* (1843) 3 D. & War. 388, 407, commented on.

APPEAL from a decision of Swinfen Eady J. (1) upon a purchaser's summons under the Vendor and Purchaser Act, 1874.

The summons asked for a declaration that the vendor had not shewn a good title to the hereditaments comprised in the contract of sale, for the return of the deposit with interest, and for costs.

The contract, dated February 28, 1911, was for the sale of certain freehold property at Chertsey for 3000*l.* The purchase was to be completed on May 1, 1911, and the purchaser paid 300*l.* deposit.

The contract provided that the title should commence with a general devise of the property contained in the will of George Cathrow, who died in 1842, and all recitals contained in any abstracted deed or document dated twenty years or upwards prior to the date of sale were to be taken as conclusive evidence of the facts or matters appearing therein respectively.

The paper title was as follows: By his will, dated May 18, 1838, George Cathrow devised the Almners Estate, of which the property in question formed part, to the use of his son James Cathrow for life, with remainder to the use of James Cathrow's sons successively according to seniority in tail, with remainder to the use of James Cathrow's daughters as tenants in common in tail, with cross-remainders between them, with remainder to the use of the testator's own right heirs.

The testator died on February 26, 1842, leaving James Cathrow his heir-at-law. James Cathrow died on June 2, 1874, without having had any issue except an infant son who predeceased him, so that at his death his remainder in fee simple vested in possession.

By his will, dated April 6, 1871, James Cathrow devised

(1) [1912] 1 Ch. 2.

all his real and personal estate to his wife, Mary Ann Frances Cathrow, and appointed her his executrix. She survived him and proved his will on June 25, 1874. The property really passed to her under this will, but by the abstract the title was not traced through her at all, but through another person, Lady Colquhoun, under the following circumstances.

It appeared that on the death of James Cathrow it was erroneously assumed that for the purposes of the testator's will the right heir of George Cathrow was to be ascertained with reference to the date of James Cathrow's death instead of at the date of the testator's death. On this erroneous assumption the heiress-at-law was Lady Colquhoun, the wife of W. A. Atkinson and daughter of another deceased son of the testator.

In 1874 Lady Colquhoun claimed the property and demanded and obtained the title deeds from James Cathrow's widow and devisee, and it was alleged that she entered into possession. It actually appeared that under an order of February 8, 1884, made in the chambers of Bacon V.-C., a sum of 1500*l.* capital money in Court to an account entitled "In the matter of the trusts of the estate of George Cathrow deceased," representing the purchase-money of part of the Almners Estate taken by the London and South Western Railway Company in James Cathrow's lifetime, was paid out to the trustees of Lady Colquhoun's marriage settlement on the basis that she had become entitled to that estate as the heiress-at-law of George Cathrow, and certain income which had accrued during James Cathrow's life was paid out to his widow as his legal personal representative.

The title was traced in the abstract to the vendor through her mother, Lady Colquhoun, who died in 1902.

In perusing the abstract the purchaser on March 30, 1911, made the following requisition:—"1. If the pedigree is correct James Cathrow himself appears to have been the testator's heir-at-law and upon failure of his own issue in his own lifetime he appears to have become tenant for life with remainder to himself in fee. The property therefore passed under the will of James Cathrow and since his death the occupiers appear to have been trespassers; the present title appears to be wholly bad."

To this the vendor's solicitors answered: "1. George Cathrow

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made a will and the question of intestacy does not arise as the will dealt with the property agreed to be sold."

On April 5 the purchaser made the following further requisition:—"1. Requisition No. 1 is repeated. There is no question of an intestacy; the 'right heir' of the testator seems to have been found on a wrong basis. According to the ordinary rule a devise (which ultimately takes effect) to the 'right heirs' of the testator passes the estate to the person who at the death of the testator is the heir-at-law of the testator."

To this the vendor's solicitors replied: "1. The vendor does not admit this for a moment. We see nothing to indicate but that the title is perfect so far as this requisition is concerned, and it has stood the test of time."

On April 13, 1911, the purchaser's solicitors wrote to the vendor's solicitors as follows: "We thank you for your letter returning answers to our further requisitions on title. The purchaser insists upon requisitions 1, 2 and 4 of the original and further requisitions. In the absence of satisfactory replies to those requisitions we are advised that the title is not in accordance with the contract and not such as the purchaser can accept."

To this the vendor's solicitors replied on April 18: "In reply to requisition 1 the vendor states that the title is in perfect order. We are quite confident that this is so, and we are prepared to rely upon this answer to the requisition. The requisition you make is bad."

On April 26 the purchaser's solicitors wrote to the vendor's solicitors: "We duly received your letter of the 18th inst. and are still advised that the title disclosed by the abstract is not such as the purchaser can accept, and we must, therefore, ask you to return us the deposit which was paid to you as stakeholders in exchange for the abstract, contract, and other documents with which you have supplied us. We are also instructed to intimate that unless your clients agree to adopt this course on or before Monday next our client will bring the matter before the Court."

On May 3 the vendor's solicitors replied declining to return the deposit, and pressing for completion in accordance with the contract. The letter then continued: "The alleged defects in the

title are not admitted. Dealing first with requisition 1. We do not admit that the title set forth is bad. The indenture dated 18th May 1878 contains a recital that Lady Colquhoun was possessed of the property and this must be taken as conclusive evidence. Supposing for a moment, however, that the title were a bad one (which we do not admit) the vendor has uninterrupted possession for more than a sufficient period of time to pass a perfect title to the purchaser."

On May 8, 1911, the purchaser issued his summons. After the issue of the summons the vendor claimed that she had shewn a good title up to 1874 and a good possessory title since that date, alleging that in 1874 Lady Colquhoun had entered into possession and receipt of the rents and profits of the Almners estate and that she and those claiming under her had been in possession ever since. The purchaser objected that he was not bound to take a possessory title.

The summons was heard on October 26, 1911, and on November 11 Swinfen Eady J. gave judgment holding that the vendor had shewn a good title and that it could be forced on the purchaser.

The purchaser appealed.

Hon. E. C. Macnaghten, K.C., and *A. Guest Mathews*, for the appellant. The vendor by the conditions of sale offered a title of a particular character, namely, a title commencing with the will of George Cathrow, who died in 1842, and the purchaser pointed out in his requisitions that that title was wholly bad. The vendor denied this, and on May 1, 1911, the date fixed for completion, the vendor was still insisting that his paper title as shewn by the abstract was perfectly good. By the letter of April 26 the purchaser repudiated the contract and asked for the return of his deposit, and subsequently issued this summons on May 8. The purchaser is entitled to say that the possessory title which the vendor subsequently offered was not the title contracted to be given, and he is entitled to refuse to take such a title: *In re Bryant and Barningham's Contract.* (1) The first suggestion of making a possessory title was not made until May 3.

(1) (1890) 44 Ch. D. 218.

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[COZENS-HARDY M.R. I am not yet satisfied that the paper title was not a perfectly good title, supplemented only by a statutory declaration.]

The most it comes to is that the vendor has been in possession since 1874. It is not a fair interpretation of the condition to say that it covered a possessory title.

[FLETCHER MOULTON L.J. It seems to me that the condition means that it is the vendor's title and that the deeds are the deeds through which the vendor's title comes down to her, and that in the circumstances it was a misrepresentation.]

It is essential in deducing title that the fee simple sold should be the fee simple to which the root of title relates. The title must be deduced and flow from one to another uninterruptedly. In this case the old title to which the root of title relates is gone. It is absolutely extinguished. It is not transferred to the disseisor. The root of title offered is now only relevant to shew that the former owner is barred. It is not the vendor's title at all or even relevant to it; and it is not right or fair for the vendor to say in her conditions that the title shall begin with a document under which she does not claim.

A purchaser can only ask for the title offered by the contract, and if he does not get that he has a right to say he will have nothing more to do with it: per Fry J. in *In re Marsh and Earl Granville*. (1) A good title means a title according to the contract, and that must be shewn at the delivery of the abstract or at least by the date fixed for completion, for a vendor is not entitled to keep a purchaser waiting while he casts about for a title: *Forrer* v. *Nash*. (2) A vendor must stand by his abstract, and if that does not disclose his true title the purchaser is entitled to consider whether that title justifies him in going on with the purchase. In this case the purchaser's refusal to accept a possessory title was not arbitrary or captious. He desires to raise money on mortgage of this property, and a possessory title would be most prejudicial to the property being accepted as a good security.

Further, covenants for title cannot be given right back to the time when the vendor stipulates that the title shall commence,

(1) (1883) 24 Ch. D. 11, 17. (2) (1865) 35 Beav. 167.

and that is one of the reasons why the Court will not force such a title on a purchaser. The vendor's covenants for title are worthless for any event previous to 1874; and there might be a claim or incumbrance dehors the whole title which the covenants for title would not cover. The purchaser wants a covenant for title which shall go back to the last purchaser.

If this is to be treated as an open contract, then the vendor's title must go back for forty years, and she does not even shew a possessory title of that length.

The judgment in the Court below was based on *Games* v. *Bonnor* (1) and *Scott* v. *Nixon*. (2) The latter was the case of an open contract. *Games* v. *Bonnor* (1) is not applicable to this case, for there the parties went on negotiating about the title and the purchaser could not have repudiated at once. In the present case the purchaser did repudiate at once, and it does not help the vendor that she may be able to make a good title now: *Hoggart* v. *Scott*. (3)

[Cozens-Hardy M.R. Your summons seems to me to be fatal to any suggestion that the contract was repudiated. If you had taken out a summons to determine the question whether the notice to rescind which you gave on April 26 was a good notice to rescind and the contract thereby terminated, it might have been different, but you have not done that: *In re Jackson and Woodburn's Contract*. (4)]

We repudiated it in the Court below.

In *In re Baker and Selmon's Contract* (5) the judge was influenced by the fact that the purchaser could see from the conditions that he might have to take a different title.

Micklem, *K.C.*, and *Dighton Pollock*, for the respondent. The vendor does shew a good title in exact accordance with the conditions. The purchaser is bound by the recitals in abstracted deeds more than twenty years old. He is therefore bound by the recital in the deed of 1878 that Lady Colquhoun succeeded as heiress-at-law of the testator.

[Fletcher Moulton L.J. If on settling the conditions you

(1) 33 W. R. 64; 54 L. J. (Ch.) 517.
(2) 3 D. & War. 388.
(3) (1830) 1 Russ. & My. 293.
(4) (1887) 37 Ch. D. 44.
(5) [1907] 1 Ch. 238.

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had known the facts would you have allowed them to go in this form ?]

No. They would have been dishonest conditions.

In 1886 the true owner was barred, and the effect of the Statute of Limitations was to execute a conveyance of the property to Lady Colquhoun: *Scott* v. *Nixon.* (1)

The vendor does therefore absolutely trace the title from 1842 onwards just as if there had been a conveyance to Lady Colquhoun instead of a mere handing over of the title deeds followed by the acquisition of a statutory title.

The present case is covered by *Games* v. *Bonnor.* (2)

Hon. E. C. Macnaghten, K.C., in reply. There is no statutory conveyance at all. The effect of the Act is merely to extinguish adverse rights: *Tichborne* v. *Weir.* (3)

Games v. *Bonnor* (2) differs from the present case because there the vendor was able to sell as mortgagee in possession under the actual root of title offered by the contract. That is just what the vendor cannot do in the present case. If a purchaser is misled by a misrepresentation, even though it be an honest one, he will not be forced to take a title other than that for which he bargained.

COZENS-HARDY M.R. This is an appeal from the decision of Swinfen Eady J., who held, on a summons under the Vendor and Purchaser Act, that a good title had been made subject only to the production of certain evidence of possession.

Now the facts of the case are undoubtedly peculiar. The death of the testator took place in 1842, and the property passed to a tenant for life, and then, subject to certain estates tail which failed, it went to the heir-at-law. In 1874 there was a question who was entitled as heir-at-law. The parties took the view that Lady Colquhoun was entitled, and not the person who it is now admitted was the true heir and entitled to the property. Correspondence took place. Lady Colquhoun claimed the property, and there is evidence which shews that the deeds were handed over in 1874 to Lady Colquhoun, and from that time she and

(1) 3 D. & War. 388, 406. (2) 54 L. J. (Ch.) 517.
(3) (1892) 67 L. T. 735.

the persons claiming through her, down to the present vendor, have not only had the title deeds, but have been in possession and have received the rents and profits of the estate. It is shewn by the abstract that the person who was the true owner in 1874 was a person not under disability, and that, therefore, there was nobody who could in any way interfere with or challenge the title of Lady Colquhoun and the persons claiming under her.

We have had a great deal of discussion as to the effect of the Statute of Limitations in a matter of this kind. As I indicated in the course of Mr. Macnaghten's reply, my present view is that the phrase "statutory conveyance," and so on, is a loose metaphorical term, and that the true view is this, that whenever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of s. 34 of the Real Property Limitation Act, and that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is nobody who can challenge the presumption which his possession of the property gives. But that, of course, does not dispose of the case at all. There is a point behind that, and a point which deserves consideration.

The property was sold under conditions. It is quite plain, and no one suggests the contrary, that this is not a case of any attempt on the part of the vendor at sharp practice, or to deceive anybody. Everything is perfectly bona fide here, and the conditions of sale provide that the title to all the lots shall commence with a general devise contained in the will of George Cathrow, who died in 1842, and the purchaser shall assume the seisin or ownership of the testator, and that the property passed by the devise, and all recitals contained in any abstracted deed or document dated twenty years or upwards prior to the date of sale are to be taken as conclusive evidence of the facts or matters appearing therein respectively. Now the abstract which was delivered began with the will, and it went on and in good faith treated Lady Colquhoun as the heiress-at-law, as the parties had

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done, and traced the title down from Lady Colquhoun to the present vendor, and it is said that although it be true, as it was admitted to be true, that the vendor has a good title to this property, it is not one which the purchaser bargained for, or was entitled to require, because one part of the title depends not upon written documents per se, but upon written documents prior to 1874, and since that date upon the fact of uninterrupted possession for the statutory period.

Now I ask myself this: Supposing the abstract had been the identical abstract which has been here delivered, and that it contained a statement that Lady Colquhoun had been in uninterrupted possession since 1874, would that or would it not have been a title which could be forced upon the purchaser under this contract? It seems to me that it would. The title begins as stipulated. Every document which is contained in the abstract does relate to the land in question. It shews facts which prove that the person who was then ousted was an absolute owner, and not under any disability, and that, therefore, there is nobody who can challenge the title of the vendor. I ask myself why is there any ground for holding that you must necessarily presuppose a title going through a number of documents without any intervening application of the Statute of Limitations. I know of no authority to justify such a contention. I think that it would have a startling effect, and it would be really inconsistent with *Games* v. *Bonnor* (1), which is a very strong case, and one which I think has a great bearing upon the matter in question. In that case the vendor was the mortgagee in possession under a mortgage dated June 21, 1859. That was the root of title, and the purchase was to be completed some day in 1880. It appeared that at the date of the contract, and at the date named for completion, he had not a good title. Having regard to the prior state of the title it was discovered after the date fixed for completion that the statutory period had run in his favour, and in an action brought after that date the difficulty was pointed out and a case laid before one of the conveyancing counsel, who said that in his opinion no title was shewn on the abstract, but that a good title might be made under the Statute of Limitations;

(1) 54 L. J. (Ch.) 517.

and the Court thought that was a title which the purchaser was bound to take, because the vendor had shewn that at the date when the action was commenced he was in a position by reason of, and in virtue of, the Statute of Limitations to make a good title to the whole property. Any other view would, I think, be very extraordinary. Let me assume an open contract. The vendor has been in possession, say, for twenty years; it may be, and I think it is true, that he would have to shew an absolute title for forty years, that is to say, to shew deeds and documents beginning before the period when he entered into possession. If he can do that (as the vendor in the present case can) by reason of possession under the deeds and documents, I do not see any reason why he should not be able to enforce specific performance, although in one sense of the word that which is the root of his title, namely, a document at least forty years old, will not have been one of the documents through which, and by virtue of which, he claims to be entitled to the property. He has satisfied the obligation to shew that he has a good title, and he can say "I shew an abstract extending back forty years," that abstract being important, of course, as shewing dealings with the property, and negativing the right of anybody to defeat the operation of the statute.

In my opinion the decision of Swinfen Eady J. was perfectly right in this case. I think also that his decision on very nearly the same point in the case of *In re Baker and Selmon's Contract* (1) was also perfectly right. That was a case where the trustee said "I am selling under a trust for sale." The fact was that there was no trust for sale. He was not in a position as trustee for sale to make a title, but he was in a position to make a title with the concurrence of the beneficiaries who had prior to the contract of sale authorized him to sell. That was a title which the purchaser was bound to take, though it was very different from that for which he bargained. It involved an investigation of the title which would have been unnecessary if there had been a mere trust for sale, and it involved questions of duty and many matters of that kind, and a different abstract from that required under the contract of sale.

(1) [1907] 1 Ch. 238.

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I think this is a case, therefore, in which there is no foundation for saying that the purchaser was entitled to assume that the title should begin in 1838 and go through a chain of deeds and documents. It is sufficient if, in fact, the vendor produced an abstract beginning at that date, and having regard to the Statute of Limitations he is in a position to say "I have a good title and I have shewn it from 1838."

I think the judgment appealed from was quite right.

Then one word only about a point which Mr. Macnaghten argued in opening the appeal and mainly relied on, namely, the question of repudiation. He says the purchaser repudiated on April 26, 1911, and was entitled to do that, because a good title had not been shewn. I think the answer to that is very short and simple. The purchaser takes out a summons and asks for rescission, treating the contract as still subsisting, and does not raise the point either in the form of the summons or upon affidavit that the contract was well repudiated before the summons was taken out, and he is content to rely on that repudiation apart from anything else. On that ground I think that that particular objection is not open to him, and that if he succeeds at all on this appeal it cannot be on that ground. In my view he is wrong in that also, and the judgment of the learned judge was right. I think this appeal fails and should be dismissed with costs.

Fletcher Moulton L.J. Rescission is a volitional act of the party who is not guilty of the breach of the contract, taking advantage of a breach that is complete on the part of the other party to the contract to exercise the right which the law gives him of terminating the contract. So soon as one party to a contract indicates that he will not perform it the other party has a right, if he chooses, to say "Very well, the contract is at an end." In this case, assuming that the vendor had said "You shall take the title I have shewn on my abstract and none other," and the purchaser had said "Then I rescind," in my opinion he would have been right, because the vendor had failed to make such a title as he had contractually engaged to make. But he did not say so, and in taking out this summons he in my

opinion has asked the Court to say, Aye or No, has the vendor fulfilled her contract. He is therefore asking the Court to decide as between him and his vendor whether such is the case, and that entirely precludes him from contending that there was a total breach of the contract which he is now entitled to take advantage of by insisting on the common law right of rescission.

I am therefore of opinion that the only question before us is whether or not the vendor has so fulfilled her contract of sale that we must compel the purchaser to complete it. That being so, I ask myself what is the contract. The conditions of sale are clearly binding on the parties. If there be a condition as to title, however severe it be on one side, however lax it be on the other, if it be one of the conditions of the contract, the vendor must comply with it and the purchaser cannot complain that he does no more. In considering whether or not the vendor is ready to perform his contract we must therefore take the measure of his obligation as fixed by the conditions. It may be that he can give a perfectly good title to the purchaser, but if he has undertaken to give a title of a particular type, and the good title which he offers is not of that type, the purchaser cannot be compelled to accept it, because it is not that which contractually the vendor has undertaken to give. An experienced conveyancer may say it is in reality as valuable and as sound a title, but the purchaser has a right to say "I do not take anybody's advice; I contracted for one type of title and no Court can make me take one which does not comply with the description in the contract." I do not put the same interpretation as my brethren on the decision in the case of *Games* v. *Bonnor*. (1) In *Games* v. *Bonnor* (1) the root of the title was to be a certain mortgage deed. The mortgagee took possession under that deed and he sold as such mortgagee. It turned out that the root of the title, if I might say so, beyond the mortgage deed was very doubtful, in fact was bad in law; but the mortgagee had taken possession under the mortgage deed and by the time the Court came to decide the point had acquired a perfectly good title under the Statute of Limitations, and the Court required the purchaser to accept it. Both parties there intended that the root of the title

(1) 54 L. J. (Ch.) 517.

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should be the mortgage deed, and the only question was whether under that deed a title could be made, and the Court in my opinion did not attempt to decide that a person must take a possessory title if it is a good one, whatever be the condition in the contract as to the title, but that under those circumstances the person claiming under the mortgage was able to give the title he had undertaken to give. If you were to put the interpretation on *Games* v. *Bonnor* (1) suggested by the respondent it would mean that whatever was the condition as to the title, provided you could give a good possessory title, the Court would force it on the purchaser. The Court could not do that without violating the principles of contract. The Courts do not create the principles of contract; they recognize them and enforce them; and in my opinion if the parties have stipulated as to the nature of the title to be shewn it is just as much an essential part of the contract which must be fulfilled as if they had stipulated that Whiteacre should be part of the property sold. The law has only to enforce the contract which the parties have chosen to make.

Taking it, then, that the title must be proved according to the condition, I turn to the condition itself. Counsel for the respondent made an admission which to my mind decides the case. There is not the slightest doubt here that the vendor acted with perfect good faith. She believed that she had a title deduced from George Cathrow, and the condition provided that she should give a title deduced from him. It turned out that that title led to the property belonging to the wife of James Cathrow in 1871, and that the supposed descent to Lady Colquhoun—the real root of the title which is now offered to the purchaser—was wrongful. She took the property by a claim the badness of which was not recognized at the time. It was not her property, and therefore the sole title by which the vendor holds is a possessory title dating from 1874 when Lady Colquhoun took wrongful possession of the property. I asked counsel for the respondent whether if he had known the facts he would have allowed this condition to appear in the conditions of sale, in view of the title which alone could be shewn by the

(1) 54 L. J. (Ch.) 517.

vendor, and he said frankly, "No, because it would not be honest to do so." What does that mean? It means that a person reading this condition, and relying of course on the honesty of the party who was making it, would not understand by it that the title to be given to him was a possessory title, such as it is now proposed to force on the purchaser. That being so, it is clear that the title is not in accordance with the condition. If the description of this title could not be honestly made in the language of the condition of sale by a person who knew the facts it follows to my mind that the condition tells the public that, if they become purchasers, they will receive a title other than that which is now sought to be forced upon them. Therefore, in my opinion, we ought to say that the purchaser cannot be forced to accept this title.

It is said, and said with perfect truth, that there is no question of bad faith here. I agree, but if with the knowledge of the truth it would have been bad faith, it seems to me that it is necessarily a misrepresentation whether you knew it or not, the only difference being that in the one case it is an innocent and in the other case it is a guilty misrepresentation, and when you are considering the question of specific performance an innocent misrepresentation carries with it the same consequences as a guilty one. I cannot say that the Court would not to some extent consider with greater severity the question of an intentional misrepresentation, but still if it was a misrepresentation, we ought not to force upon the purchaser this title, because it is not the title which he had the right to assume was going to be given to him.

Now it is said that a good title is a good title. It may be so, but there may be prejudices both in the purchaser and in the market against mere possessory titles. I do not think we have to consider whether it is reasonable that a person should object to a possessory title. The question is whether he is bound to accept it having regard to his contract. That being so, it is not very important to examine closely the contrast between the two titles. The language of the condition points to a title evidenced by documents and not to a possessory title. But it is suggested by counsel on behalf of the vendor that there is a technical

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performance of this condition in a certain sense. He admits that nobody would understand the condition in that sense because he admits that no honest man could have used this language as describing the title which he now says technically satisfies it. He points to a recital in a deed more than twenty years old that Lady Colquhoun was the heiress-at-law of George Cathrow. If you look at the deed you find that it is a recital which could not be relied on by any one, because it says quite plainly that she is the heiress-at-law of a person whereas the deed itself contradicts this. It is just as insensate as if it had said that the said Lady Colquhoun was the eldest son of her father and therefore succeeded to the estates. It is a thing absolutely inconsistent with the rest of the deed. I do not think that the condition that all recitals are to be accepted can include a statement which is absolutely contradicted by the deed in which it occurs, so that any Court construing the deed would recognize that the recital was obviously a mistake. The ordinary rules of construction include the correction of such mistakes, and therefore this so-called recital is to be rejected as not forming part of the deed. Therefore in my opinion this suggested title does not even technically comply with the condition.

It is well to trace the consequence of a decision that such a title as this can be forced on a purchaser. It practically means that however far back the root of the title is said to be, the vendor may force upon the purchaser a title with any number of interruptions filled up by possessory titles. If this is good law no purchaser would be able to protect himself in future from having to take such a title unless there was in the conditions of sale a negative stipulation to the effect that no possessory title would be given. Now I cannot believe that such a decision is in conformity with what honest and capable conveyancers would feel themselves bound to do in drawing up conditions of sale, and I regret very much that the Court should now come to a decision which to my mind will enable conditions of sale to be drawn up so as to deceive persons who are not very skilled lawyers, and expose them to the necessity of accepting titles which could not be honestly described as coming within the language of the conditions.

On the other hand I desire to express my entire agreement with the explanation given by the Master of the Rolls of the operation of the Statute of Limitations. I think it was both accurate and extremely happily expressed. Possession is prima facie evidence of right, and that evidence becomes conclusive when the rights of all other people are extinguished. That is the effect of the statute. The metaphor in *Scott* v. *Nixon* (1) used by Lord St. Leonards of its being analogous to a conveyance is a very dangerous metaphor, the danger of which was pointed out in *Tichborne* v. *Weir*. (2) The true explanation is that which has been given by the Master of the Rolls.

For these reasons I am of opinion that, although I am clear that the question of voluntary rescission is not before us at all, the title to the estate which the vendor is now prepared to give is not one which satisfies the contractual obligations which she took upon herself by the conditions of sale, and that, whether it is a good title or not, it is not one that can be forced on the purchaser. I am therefore of opinion that this appeal ought to be allowed.

Buckley L.J. In my opinion this appeal fails. On the question of the purchaser's notice of April 26 the members of the Court are of one mind, and I do not wish to add anything on that point.

Upon the main point I agree with the judgment delivered by the Master of the Rolls. I will state my reasons in my own words, and they shall be few. I start with this, that the vendor has shewn a good title, and the purchaser admits that he has shewn a good title. But the purchaser's contention is that having regard to the conditions of sale he was entitled to have a title of a certain sort shewn to him, and the vendor has not shewn him a title of that sort, but has shewn him a good title of another sort. Now to describe the sort of title which he says he ought to have had it may be stated thus: under the conditions of sale the title was to commence with a certain will of 1838, and he says "under those conditions you could only compel me to take a title in which that deed of 1838

(1) 3 D. & War. 388. (2) 67 L. T. 735.

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was a relevant and necessary factor, and one which shews that by devolution there is vested in me that title which in 1838 was vested in the then owner." What has happened is this. An abstract of title was delivered which traced the title down to 1874, and then traced it onwards through one Lady Colquhoun, who was in 1874 treated as being, though she was not in fact, entitled as heiress-at-law of George Cathrow. In point of fact, the person who became entitled as heir-at-law was his son James Cathrow, and the property had passed under James Cathrow's will to James Cathrow's widow, and Lady Colquhoun had nothing to do with it. The abstract, however, went on to trace the title as if Lady Colquhoun was, as everybody at that date thought she was, and as the Court in 1884 in point of fact treated her as being, entitled, and traced the title as if it were one of devolution from the will of 1838 straight onwards. The fact was that that was not so. In 1874 if the title had been traced by devolution it ought to have been traced from the widow of James Cathrow. But this difficulty having been pointed out, the vendor said "That does not make any difference. Lady Colquhoun went into possession and got all the deeds in 1874—that is thirty-eight years ago—and I have a perfectly good possessory title"; to which the purchaser replied "I am not bound to take the possessory title; you must under these conditions shew me a title derived by devolution from the testator of 1838."

To my mind that is not so. I do not think there was any contract that he should have a title of that kind. I will try it by two tests. The first test I apply is this. Suppose that the abstract had traced the title to 1874, and then had stated that Lady Colquhoun was not the heiress-at-law, but that from that time onwards to 1911 she had been in possession. If the abstract had been in that form could the purchaser have been compelled to take the title? I should say unquestionably, because in that case though the will of 1838 would not have been a document material in tracing the title by devolution, yet that abstract would have commenced at the agreed date and would have shewn a perfectly good title. The purchaser would, I conceive, have been bound to take it.

The second test which I will put is that of an open contract.

Suppose there had been an open contract. The vendor would have been bound to shew a forty years title. But assume that he had only a possessory title say for fifteen years. Still he would have had to shew a title for forty years so as to exclude the possibility of a state of facts which might go to negative his possessory title. Suppose he had done that, could the purchaser have said "I will not take it, because the deeds of forty years ago have nothing to do with the title which you are shewing"? Certainly the purchaser could have been compelled to take that title.

There is another consideration, and it is this. It is not the fact that the deeds prior to the date when adverse possession commenced are irrelevant. They are relevant. They may be relevant in various ways. They may be relevant to shew that at the date when the adverse possession commenced there was not a person under disability who could defeat the title by possession. They may be material under certain circumstances to shew what was the estate of which adverse possession was taken, as, for instance, that by statute there was some right against the land which would bind everybody into whose hands it might come. Early documents may be material, and it does not at all follow because the root of title is specified as being of a date prior to that at which the title by adverse possession commences that those deeds are necessarily irrelevant. Upon principle it seems to me that the vendor shewing a good title is entitled to say to the purchaser "You must take that; I have done that which I contracted with you that I would do. I have begun in 1838; I have shewn all the material facts from that time to the present. The date of commencement of title is named only so as to relieve me from going to an earlier date." That is what is meant by the root of the title. It is not meant that the named deed or will is the root of the title in the sense that that deed or will is an essential factor in establishing the title which is ultimately to be accepted.

Apart from principle it seems to me that the matter is concluded by *Games* v. *Bonnor* (1), not because there are not certain distinctions to be found between that case and the present case

(1) 54 L. J. (Ch.) 517.

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—I think there are—but because *Games* v. *Bonnor* (1) has affirmed the principle which I have been seeking to enunciate. It seems to me that that case necessarily involves that where as between two contracting parties a title is to be shewn as from a defined date the purchaser can be compelled to take a possessory title commencing at a later date; in other words, though you cannot in a contract of this kind get away from the proposition that the title to be shewn is to be such as stipulated, there is nothing which entitles the purchaser to say that the contract is that he is not to have a possessory title, but is to have some other title, namely, a title commencing with the root of title and shewing title therefrom by devolution.

On these grounds it seems to me that the decision of the learned judge was right, and that this appeal must be dismissed.

Solicitors: *Durham, Carter & Durham; Beaumont, Son & Rigden, for Paine, Brettell & Porter, Chertsey.*

(1) 54 L. J. (Ch.) 517.

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SLINGSBY *v.* SLINGSBY.

C. A. 1912 March 15.

Practice—Writ—Service out of Jurisdiction—Action to perpetuate Testimony—Subject-matter of Action—Land within the Jurisdiction—Rules of the Supreme Court, Order XI., *r.* 1 (*a*), (*c*).

Where an action to perpetuate testimony is brought with a view to obtaining and preserving evidence to be used in a future action to establish a title to land situate within the jurisdiction, service of the writ out of the jurisdiction cannot be allowed under Order XI., r. 1 (*a*), the whole subject-matter of the action not being land, but evidence.

THIS was an appeal, ex parte, from a decision of Warrington J. refusing to grant leave to serve upon the defendant, who was out of the jurisdiction, the writ in an action to perpetuate testimony. The action was brought for the purpose of taking, preserving, and perpetuating the testimony of certain witnesses concerning the question whether or not the defendant was the lawful child of one Charles Henry Reynard Slingsby, now residing in British Columbia, and whether or not he was in priority to the plaintiffs, or at all, entitled or contingently entitled in remainder in tail male or otherwise to certain estates in Yorkshire which were comprised in and settled by an indenture of July 19, 1900. Under this settlement the Reverend Charles Slingsby Slingsby was tenant for life in possession of the said estates, his eldest son the said Charles Henry Reynard Slingsby being tenant for life next in remainder. Subject as aforesaid the estates were limited to the first and other sons successively of C. H. R. Slingsby according to seniority in tail male with remainder to the second son of C. S. Slingsby for life with remainder to his first and other sons in tail male with remainder to the third son of C. S. Slingsby for life with remainder to his first and other sons in tail male with remainder to the fourth son of C. S. Slingsby for life with remainder to his first and other sons in tail male with remainder to the fifth and every other son thereafter to be born of C. S. Slingsby in tail male with remainder to the right heirs of C. H. R. Slingsby. The action was brought by the second, third, and fourth sons of C. S. Slingsby and the trustees of the settlement.

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The defendant was an infant resident out of the jurisdiction. He was born in California on or about September 1, 1910, and was alleged by the said C. H. R. Slingsby and by his wife to be their legitimate child and was originally registered as such in the State of California. The plaintiffs were informed and believed that the defendant was in fact not the child of the said C. H. R. Slingsby and his wife but was the child of another parentage altogether, and that this had been established by the evidence on oath of certain witnesses in an official investigation under the provisions of the Political Code of California with a view to the rectification of the entry in the State Register as to the defendant's birth. It was the evidence of these witnesses which it was sought by the action to take and perpetuate, with a view to a possible future action to establish the title of the plaintiffs to the settled property.

The said C. H. R. Slingsby was born and married in England, and though he was now residing in British Columbia there was evidence that his domicil was still English.

An application by the plaintiffs for leave to serve the writ upon the defendant out of the jurisdiction was refused by Warrington J. on the ground that the case did not come within Order xi., r. 1 (*a*) (1), the whole subject-matter of the action not being "land situate within the jurisdiction."

The plaintiffs appealed.

J. M. Gover, for the appellants. This action is really a preliminary proceeding in a future action to establish the plaintiffs' title to land within the jurisdiction. Order xi., r. 1 (*a*), therefore applies, though in a sense no doubt the subject-matter of the present action is evidence. There would be great difficulty in obtaining a declaratory judgment under Order xxv., r. 5, and apart from that the plaintiffs would seem to have no remedy. Alternatively the case is within Order xi., r. 1 (*c*).

(1) Order xi., r. 1, provides that "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—(*a*) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or . . . . (*c*) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction."

There is no direct authority on the point, but the following cases may have some bearing upon it: *In re Stoer* (1); *Agnew* v. *Usher*. (2)

[COZENS-HARDY M.R. referred to *Gurney* v. *Gurney*. (3)]

COZENS-HARDY M.R. I do not see my way to accede to this application. Mr. Gover has put before us the inconvenience of the consequences which will ensue if the leave which he asks is not granted, but this is originally a statutory jurisdiction and not part of the inherent jurisdiction of the Court, and we are bound by the terms of the Rules. The action to perpetuate testimony is of a peculiar kind. There is never a trial. It is only a means of securing and preserving evidence to be used if and when a subsequent action should be commenced with reference to the title to land. It is suggested in the present case that the defendant, who is an infant resident abroad, is not the child of his putative father, the brother of the plaintiffs. If this is so, then the plaintiffs in the event of their elder brother having no issue will be entitled to certain estates in remainder after his death. The object of the action is to procure and perpetuate evidence as to the defendant's birth in order that such evidence may be available in a future action to establish the plaintiffs' title to the estates. Under these circumstances it is contended that the case comes within Order XI., r. 1 (*a*), as an action the whole subject-matter of which is land situate within the jurisdiction, and therefore that the writ in this action ought to be allowed to be served upon the defendant out of the jurisdiction. In my opinion the Court cannot allow that service. No relief is asked in the action except to take evidence which is to be kept sealed up until another action shall be instituted. That is the ground upon which the application for leave to serve the writ out of the jurisdiction was refused by the learned judge in the Court below, and I think he was quite right. There may be other means by which the issue can be determined, but in my opinion this particular mode of obtaining evidence for that purpose cannot be adopted. The appeal must be dismissed.

(1) (1884) 9 P. D. 120. (2) (1884) 14 Q. B. D. 78.
(3) (1863) 1 H. & M. 413.

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FLETCHER MOULTON L.J. If the defendant were resident within the jurisdiction I think this action to perpetuate testimony would be a very proper step. By the time it is required most of the testimony which it is sought to perpetuate may have ceased to be available under the strict rules of evidence in such cases. For this reason I should be inclined to do my best to prevent the fact that the defendant is not domiciled within the jurisdiction from hindering a very useful means of furthering justice. But the Court is bound by the provisions of Order xi. I agree with the Master of the Rolls that in this action no relief is claimed except to take evidence, and that it is impossible for us to give leave to serve such a writ out of the jurisdiction. The appeal must be dismissed.

BUCKLEY L.J. As I understand the facts the first three plaintiffs are the second, third, and fourth sons of a living father and they have a living elder brother. The other plaintiffs are the two trustees of a settlement. Under that settlement land within the jurisdiction is settled in such a way as that the father is tenant for life in possession. The eldest son is the first tenant for life in remainder. An alleged son of that son is (if he be such son) first tenant in tail subject to those prior interests. The plaintiffs other than the trustees are contingently entitled as tenants for life successively in remainder. The action is one in which those three sons, the second, third, and fourth sons, sue the supposed offspring of the first son to perpetuate testimony, endeavouring to shew that the defendant is not the son of his putative father, but is a child of some other parentage altogether. The defendant is resident out of the jurisdiction. The question is whether we can give leave to serve the writ upon him out of the jurisdiction. In the first place it is said that the whole subject-matter of the action is land situate within the jurisdiction within Order xi., r. 1 (*a*). But the subject-matter of this action is not land, but evidence. Further, the fact to be established is a fact which may be relevant not to this land only, but to any property whatsoever upon which the question may come in issue whether this child is the child of his putative father. Then it is said that if the case is not within Order xi., r. 1 (*a*),

then it is within r. 1 (*c*), the relief being sought against a person domiciled or ordinarily resident within the jurisdiction. That is a very peculiar point. The putative father of the child is domiciled within the jurisdiction, so that if the plaintiffs' case were that the child is his child the child's domicil would be within the jurisdiction. But the plaintiffs' case is that the child is not his child. Further, suppose that the plaintiffs could be allowed to say for this purpose (contrary to their own case) that the child is the child of the putative father, what is the relief sought? There is no relief sought in the action—it will never come to trial—no relief will ever be given. Having said so much to shew that this application must fail, I hope that human ingenuity is not exhausted and that some way of dealing with this matter will ultimately be found, but I think this appeal must be dismissed.

Solicitors: *Gray & Dodsworth.*

G. A. S.

In re CONNOLLY BROTHERS, LIMITED (No. 2). WOOD *v.* THE COMPANY.

[1911 C. 469.]

Company—Debentures—Floating Charge on Present and Future Property—No Power to create Charges in Priority—Purchase of Property by Company — Advance of Purchase-money — Equitable Charge on Property so purchased—Deposit of Title Deeds—Priority.

A company issued debentures creating a floating charge upon their undertaking and all their property present and future, one of the conditions of the debentures being that the company should not be at liberty to create any other mortgage or charge in priority to the debentures. All the debentures were duly registered under the Companies Act, 1900. The company desiring to purchase certain property, which they had not the money to pay for, borrowed 1000*l.* from O. upon terms that she should have a charge upon the property so purchased. The company then bought the property for 1100*l.* and paid a deposit of 150*l.* Upon completion of the purchase O. was present and gave her cheque for 1000*l.*, which was paid into the company's banking account, the company paying the balance of the purchase-money to the vendor in cash. The same solicitor acted for all parties, and he took and retained the title deeds of the property on behalf of O. A week later the company executed in favour of O. a memorandum of equitable charge upon the

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property. The solicitor did not investigate the title nor search the register of debentures on O.'s behalf. In an action to realize the debentures:—

Held, that what the company acquired upon the purchase was only the equity of redemption in the property subject to the equitable charge of O., who was accordingly entitled to priority over the debentures.

Decision of Warrington J. affirmed.

THIS was an appeal from a decision of Warrington J. raising the question whether the owner of an equitable charge on specific property of the defendant company had or had not priority over the general floating charge created by certain debentures issued by the company and the trust deed by which they were secured. In 1901 the defendant company created a series of 30,000*l.* first mortgage debentures which were secured by a trust deed dated July 15, 1901, and made between the company of the one part and J. B. Lloyd and T. Bolton of the other part. The whole of the debentures were issued at various dates between July, 1901, and October, 1903. They were all in the same form. The company thereby charged with the payment of principal and interest by way of floating security the undertaking of the company and its property both present and future, including all its uncalled capital for the time being. Each of the debentures was issued subject to the conditions indorsed thereon and which were to be deemed part of it. One of the conditions was that the debentures were to rank pari passu as a first charge on the property thereby charged without any preference or priority one over another, and such charge was to be a floating security, but so that the company was not to be at liberty to create any other mortgage or charge or confer any lien to rank equally with or in priority to the said debentures.

The trust deed itself, after a specific conveyance to the trustees of certain freehold property, provided by clause 4 as follows: "The company doth hereby charge in favour of the trustees its other property and assets both present and future (including capital for the time being uncalled) and its undertaking with the payment of all moneys payable under the debentures of these presents and such charge shall operate as a floating security but the company shall not be entitled to create any mortgage or charge or confer any lien upon the premises expressed to be

hereby charged or any of them in priority to or ranking pari passu with these presents."

Both the trust deed and the debentures as they were issued were duly registered at Somerset House in pursuance of the Companies Act, 1900.

In 1904 the company were desirous of purchasing certain premises in Manchester, but had not the money wherewith to make the purchase. They accordingly applied to one Mrs. O'Reilly to advance the sum of 1000*l.* for the purpose of enabling them to purchase the property and agreed to give her a charge upon the property so purchased to secure the sum to be advanced by her, and she consented to make the advance on those terms. The company thereupon entered into a contract for the purchase of the property for the sum of 1100*l.* and paid a deposit of 150*l.*, leaving 950*l.* of the purchase-money unpaid. The contract was to be completed on March 31, 1904, and on that day Mrs. O'Reilly was present at the completion and drew a cheque for 1000*l.* in favour of the company, into whose banking account it was paid. The company then drew a cheque for 950*l.*, which was cashed, and on the completion of the purchase that cash was handed over to the vendor. Upon this transaction Mr. Mercer, the vendor's solicitor, acted both for the company and for Mrs. O'Reilly. He knew of the arrangement between her and the company, and on the conveyance being executed he retained the deeds on her behalf. All this took place on March 31, 1904, just before the Easter holidays, and on April 6, 1904, the company executed to Mrs. O'Reilly a memorandum that the company had deposited with her the documents comprised in the schedule thereto (being the title deeds of the property) with intent to create an equitable charge upon all the property comprised therein or to which the same related for securing the repayment by the company to Mrs. O'Reilly of the sum of 1000*l.* then advanced and paid by Mrs. O'Reilly to the company with interest thereon. The memorandum also contained an agreement enabling the company to pay off the debt by instalments, and an agreement by the company to execute a legal mortgage if required. Mr. Mercer did not know of the existence of the debentures, and made no search, nor did he investigate the title as

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between Mrs. O'Reilly and the company, or indeed at all, as the title was known to him. In pursuance of the agreement certain instalments were paid, and there remained due to the executor of Mrs. O'Reilly, who had since died, the sum of about 800*l.* In 1911 the plaintiff commenced this action for the realization of the debentures, and on May 30, 1911, judgment was pronounced directing the usual accounts and inquiries to be taken and made, including "an inquiry whether as regards the property comprised in the memorandum of 6th April, 1904, such memorandum and the moneys thereby secured have priority over, or are subsequent to the first mortgage debentures." The Master by his certificate filed on December 20, 1911, found that the memorandum and the moneys thereby secured had priority over the debentures.

Upon a summons by the plaintiff on behalf of himself and the other debenture-holders to vary the certificate, Warrington J. held that the finding of the Master was correct and dismissed the summons. In the course of his judgment he said: "The case of Mrs. O'Reilly may be put in two ways, in either of which I think she was entitled to succeed. It may be put, as it has been, on her behalf, that by virtue of the doctrine of subrogation she stands in the place of the vendor, and therefore has the benefit of the vendor's lien. The facts, I think, are quite clear that she did not agree to advance this money unconditionally; but that she agreed to make this advance for the purpose and sole purpose of paying off this purchase-money, and under a contemporaneous agreement that she was to have a charge upon the property so purchased. It is quite true that there was no direct agreement between the vendor and Mrs. O'Reilly that the vendor's lien should be transferred to her, but I think that the case comes substantially so far as its facts are concerned within the final decision of the Vice-Chancellor in *Meux* v. *Smith* (1), and also substantially within the decision of Farwell J. in *Bird* v. *Philpott.* (2) On the principle of those two cases I think the present case might be decided in favour of Mrs. O'Reilly.

"But there is another aspect of the case which, in my opinion also, requires the Court to decide it in her favour. It must be borne in mind that these debentures and the trust deed, so far

(1) (1843) 11 Sim. 410, 432. (2) [1900] 1 Ch. 822.

as this after-acquired property is concerned, amount to nothing more than a contract by the company to give to the debenture-holders a security upon this particular item of property by its description as appearing in the conveyance, but only on such interest as the company may in fact acquire in that and their other after-acquired property. Now, in my judgment, the company on the facts of this case never acquired as against Mrs. O'Reilly any interest in this property at all, except subject to the obligation of giving to her a charge for the amount of the purchase-money which she so advanced. That may be only another aspect of the case as stated with reference to the authority in 11 Simons. It is another aspect, but I think it is one in which the position of Mrs. O'Reilly is equally strong, and I think on that ground also I must decide that the Master's certificate is right. I think that, putting it in that way, the security acquired by Mrs. O'Reilly takes priority over the debentures because it takes priority over the interest of the company itself, and that nothing was ever subject to the trust deed except what one may describe as the equity of redemption, subject to the security created in favour of Mrs. O'Reilly."

From this decision the plaintiff appealed.

Clauson, K.C., and *Sargant*, for the appellant. Mrs. O'Reilly obtained only an equitable charge which ranks after the debentures.

[BUCKLEY L.J. Is it not a question of fact as to what the company really acquired by their purchase?]

If the proper searches had been made on Mrs. O'Reilly's behalf it would have been discovered that the company was not in a position to give her a prior charge.

[BUCKLEY L.J. The question is whether the company acquired the property unfettered by any charge to Mrs. O'Reilly.]

She simply agreed to take a charge. That being so, her position must be behind the debenture-holders. She was bound to investigate the title, and must take the consequences of not having done so. She was prepared to take the risk of having her security postponed to any prior charges that might exist. The transaction might have been carried out in such a way as to

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give her a prior charge, but the form of the deeds cannot be altogether disregarded.

[BUCKLEY L.J. The learned judge found as a fact that the solicitor retained the deeds on Mrs. O'Reilly's behalf.]

She never got more than the equitable charge which was executed on April 6. She must be treated as affected with constructive notice of the debentures, of which she would have had actual notice if she had made proper searches. The debentures must have been discovered either by a search in the register, or by the delivery of an abstract and an investigation of title in the ordinary way: *English and Scottish Mercantile Investment Trust* v. *Brunton.* (1)

[COZENS-HARDY M.R. The point of notice does not arise if the Court is against you on the question as to what the company actually acquired.]

Cave, K.C., and *Hartree*, for the respondent, were not called upon.

COZENS-HARDY M.R. This is an appeal from the order of Warrington J., who has decided that Mrs. O'Reilly has an equitable charge on this particular property in priority over the general floating charge created by the debentures and the debenture trust deed. The company had issued debentures in the usual form and executed a trust deed for the purpose of securing them on the present and future property of the company, and by the terms of one of the conditions indorsed on the debentures the company were not to be at liberty to create any other mortgage or charge to rank equally with or in priority to these debentures. In the year 1904 the company wanted to purchase certain freehold property, but could not do so without obtaining the money wherewith to make the purchase. They accordingly applied to Mrs. O'Reilly to advance them the sum of 1000*l.*, and they agreed to give her a charge upon the property so purchased to secure the sum to be advanced by her. She consented to make the advance on those terms. The company thereupon entered into a contract for the purchase of the property for the sum of 1100*l.* and paid a deposit of 150*l.*, leaving 950*l.* of the purchase-money

(1) [1892] 2 Q. B. 1.

unpaid. Mrs. O'Reilly found the 1000*l.*, she was present at the completion of the purchase, and her cheque for 1000*l.* was not handed to the vendor because there was only 950*l.* due on the purchase. It was paid into the company's banking account, upon which the company drew a cheque for 950*l.*, which was cashed, and on the completion of the purchase that cash was paid over to the vendor. Now, what was the effect of that? Did the company as between themselves and Mrs. O'Reilly ever become the absolute owners of the property? Or was not the bargain that Mrs. O'Reilly was to have a first charge, and the company was only to get the property subject thereto? In my opinion we should be shutting our eyes to the real transaction if we were to hold that the unincumbered fee simple in the property was ever in the company so that it became subject to the charge of the debenture-holders.

But there is another way of arriving at the same conclusion. Mercer was instructed to act as solicitor for all parties. He was present at the completion, took the deeds, and says he held them on behalf of Mrs. O'Reilly. What reason is there to disbelieve that evidence, which is in accordance with the course of the whole transaction? The learned judge certainly drew that inference from the evidence, and I think it was the proper inference, and that being so, I am of opinion that all the company in equity obtained was the equity of redemption in the property subject to Mrs. O'Reilly's charge of 1000*l.* The appeal must be dismissed.

BUCKLEY L.J. I agree. If on March 31, 1904, the company acquired the unincumbered fee simple in the property, then the debenture-holders are right. If on the other hand on that date the company obtained the property subject to a contractual obligation to give a first charge on it to Mrs. O'Reilly, then the debenture-holders can get no more. For the moment neglect the debenture-holders altogether. Had Mrs. O'Reilly a contractual right as between herself and the company to have the security? [His Lordship referred to the evidence as to the bargain, and continued:] The facts as to what took place on the completion of the purchase are immaterial if the memorandum of equitable charge dated April 6 was executed

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by the company in pursuance of the bargain which was entered into previously. I think it was, and that is borne out by the retention of the deeds by Mr. Mercer on Mrs. O'Reilly's behalf. I agree that this appeal should be dismissed.

Solicitors for appellants: *F. C. Mathews & Co., for John Leigh Wells & Co., Manchester.*

Solicitors for respondent: *Ford & Ford, for Richard Higham & Co., Manchester.*

G. A. S.

JOYCE J. 1911 — *Dec.* 6, 7. 1912 — *Feb.* 19.

In re AN APPLICATION OF R. J. LEA, LIMITED, FOR REGISTRATION OF A TRADE MARK.

In re AN APPLICATION OF WILLIAM McEWAN & CO., LIMITED, FOR REGISTRATION OF A TRADE MARK.

Trade Mark—Registration—Special Application—Surname—"Boardman's"—"McEwan's"—"Distinctive Mark"—"Adapted to distinguish"—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* (5.); *ss.* 9, 44.

The mere surname of an individual, although it may be "adapted to distinguish" the goods of all the persons, taken collectively, who bear that surname from the goods of other persons bearing a different surname, is not "adapted to distinguish" the goods of a particular applicant, even though his surname be an uncommon one, from those of other persons within the meaning of that expression in the Trade Marks Act, 1905, and ought not therefore to be registered under paragraph (5.) of s. 9 of the Act.

MOTIONS.

In November, 1910, R. J. Lea, Limited, wholesale tobacconists, of Manchester, applied to register the word "Boardman's" under paragraph (5.) of s. 9 of the Trade Marks Act, 1905, as a trade mark in class 45 in respect of manufactured tobacco, and in April, 1910, William McEwan & Co., Limited, brewers, of Edinburgh, similarly applied to register the word "McEwan's" as a trade mark in class 43 in respect of beer.

The Board of Trade referred both applications to the Court under r. 39 of the Trade Mark Rules, 1906, and notices of motion having been served upon the Registrar of Trade Marks, both motions now came on for hearing together.

It was admitted that the marks were not such as would fall within the description of paragraphs (1.), (2.), (3.), and (4.) of s. 9 of the Trade Marks Act, 1905, but it was claimed that they were distinctive marks within paragraph (5.) as adapted to distinguish the goods of the respective applicants from the goods of other persons.

IN RE R. J. LEA, LIMITED.

The material facts in evidence relative to this application were as follows:—

The applicant company carried on a very large business as tobacco and cigarette manufacturers at Manchester and were the successors in business of Robert John Lea, who for over fifty years had carried on business as a tobacconist. Previous to the year 1868 R. J. Lea had supplied to a Mr. Boardman, who was a licensed victualler in Manchester, a tobacco mixture which became known amongst his friends and acquaintances and for the purposes of identification was asked for as "Boardman's" mixture. In the year 1868 R. J. Lea with Boardman's sanction commenced to sell and had since continuously sold this mixture to the public at large under labels bearing the name "Boardman's Smoking Mixture," in addition to other matter including the name and address of R. J. Lea and his usual trade mark device of wild strawberry leaves. This label was registered in 1887 as a whole for "tobacco, being a smoking mixture" in class 45 under the number 69,908.

"Boardman's" tobacco had established a very considerable reputation and enjoyed a very large sale. The applicants and their predecessors in business had for many years made a speciality of this and two other brands, known respectively as "Chairman" and "Recorder," of different strengths, and had largely sold and advertised the three brands in conjunction with each other. There was evidence of very wide user and also that no other tobacco had been placed on the market under a name similar to "Boardman's."

Hughes, K.C., and *Sebastian*, for the applicants. A trade mark means a mark used upon goods for the purpose of indicating that they are the goods of the proprietor of such trade mark: s. 3 of

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the Trade Marks Act, 1905. Any distinctive mark is a registrable trade mark: s. 9, paragraph (5.); but a mark which does not fall within paragraphs (1.), (2.), (3.), and (4.) of the section is not, except by order of the Board of Trade or the Court, to be deemed to be a distinctive mark.

The evidence clearly shews that "Boardman's" means a particular tobacco made by the applicants and that it is de facto distinctive and adapted to distinguish, and does in fact distinguish, this tobacco from all others. Nothing can be better "adapted to distinguish" goods of a particular man than that man's own name. The form of order in *In re Whitfield's Bedsteads* (1) shews that the only question for the Court is whether the word "Boardman's" has by user become distinctive. Sect. 44 of the Act protects any other man of the same name who wishes bona fide to use his own name in carrying on business.

The decision of Warrington J. in *In re Pope's Electric Lamp Co.'s Application* (2) that a man's name was not "adapted to distinguish" his goods from those of other persons is contrary to the whole reasoning of Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons* (3), and contrary also to the views expressed in *Ainsworth* v. *Walmsley* (4) and *Richards* v. *Butcher* (5), which were not cited in *In re Pope's Electric Lamp Co.'s Application.* (2) Those were not cases on registration, but they shew that a man's name is or may be "adapted to distinguish" and that Warrington J. adopted an erroneous view if he decided that it never can be distinctive. [They also cited *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (6)]

Sir Rufus Isaacs, *A.-G.*, and *Sargant*, for the Registrar of Trade Marks. The considerations available in an action based upon common law rights are not applicable to a question of registration.

The question for the consideration of the Court is whether the Court is at liberty to say that an ordinary surname is "adapted to distinguish." Every person of the name of Boardman ought to be able to enter the tobacco business without having to bear

(1) [1909] 2 Ch. 373.
(2) [1911] 2 Ch. 382.
(3) [1910] 1 Ch. 130.
(4) (1866) L. R. 1 Eq. 518.
(5) [1891] 2 Ch. 522.
(6) (1900) 17 Rep. Pat. Cas. 673, 681.

the burden of shewing to the satisfaction of the Court that his business is carried on bona fide, as provided by s. 44 of the Act, the meaning of which was discussed by Parker J. in *In re Gramophone Co.'s Application.* (1) The Court will always try to prevent a monopoly in a name. In *In re California Fig Syrup Co.* (2) the application was only allowed by the Court of Appeal to proceed on the ground that what was being registered was not the word "California," but the combination of words "California Syrup of Figs," and this application would stand very differently if it were to register the combination of words "Boardman's Smoking Mixture."

The whole of s. 9 shews that the Court must exercise great care in respect of the registration of names.

Registration, which is permanent and independent of the facts of user, might give to the applicants in the future a right against other persons of the name of Boardman which they ought not to enjoy and which under their common law rights they would never obtain.

Hughes, K.C., in reply. The intention of the Act is to bring the privilege given by registration into harmony with the rights given by the common law. If the applicant proves that he could get an injunction to restrain use of the name by others, then he is entitled to registration. The evidence in this case is conclusive. The order in *In re Whitfield's Bedsteads* (3) was so framed because it would have been a fraud on the public if a form of bed not recommended by Dr. Lawson-Tait had been called by his name.

Cur. adv. vult.

IN RE WILLIAM MCEWAN & CO., LIMITED.

The material facts in evidence relative to this application were as follows:—

The applicant company were very large brewers at Edinburgh and were the successors in business of William McEwan, who had established the business previously to the year 1865. The beer brewed by the applicants and their predecessors had always

(1) [1910] 2 Ch. 423. (2) [1910] 1 Ch. 130.
(3) [1909] 2 Ch. 373.

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been known as "McEwan's" and had attained a very large sale and a world-wide reputation, and no other brewer of the same name was known to exist.

In the year 1880 William McEwan registered a label, which was stated to have been used by him for fifteen years previously, bearing the word "McEwan's" and a device of a hand upholding a globe under the number 22,772, for "beer of all descriptions" in class 48. Subsequently, in the same year, he registered a similar label, which had been used for about nine years previously, with a slightly different device. A variety of other labels were also used in the business, but all bore the word "McEwan's" and the total number of such labels used exceeded an average of five millions a year.

Hughes, K.C., and *Sebastian*, for the applicants. The evidence shews that for beer the word "McEwan's" has become distinctive, so that no other person could carry on business as a brewer under that name without distinguishing his goods from the applicants'.

[JOYCE J. This is very like the case of *In re Pope's Electric Lamp Co.'s Application.* (1)]

There was no evidence in that case that so far as the general public were concerned the word "Pope" had acquired any secondary meaning. We submit that the decision in that case was erroneous if it proceeded on the ground that no surname should be registered.

The reasons for which the applicants desire this registration are (1.) to obtain foreign registration, for at present a foreigner can register the applicants' name and stop them using it; (2.) because a passing-off action is a slower and more difficult remedy than an action for infringement; (3.) because persons are constantly under the impression that they can use anything which is not registered; and (4.) because the Board of Trade has registered "Bass," "Guinness," and "Vaux." If the evidence of reputation is sufficient the registration should be directed to proceed.

From 1875 onwards it has been possible to register names on the footing of their being "old marks" if they were special and distinctive. Names were always passed by Sir George Jessel

(1) [1911] 2 Ch. 382.

when applied for as old marks, during the time when he was Commissioner of Trade Marks.

Sir Rufus Isaacs, A.-G., and *Sargant*, for the Registrar of Trade Marks. It is true that at one time the Board of Trade did not refer these cases to the Court, but now they refer them on the question of principle, and the decided cases are against the applicants. *In re Pope's Electric Lamp Co.'s Application* (1) is decisive on the point that a surname is not registrable.

The considerations which govern the question of "adapted to distinguish" have been discussed in many recent cases, of which one of the latest is *In re Leopold Cassella & Co.] Gesellschaft M. B. H.* (2), the "Diamine" case, and the whole policy of the Court, and especially of the Court of Appeal, has been to limit, rather than to extend, the registration of words under s. 9, paragraph (5.). The name "McEwan" is a common name well known in the city of London.

We are seeking to establish a principle and do not ask for costs in the event of the application being refused.

Hughes, K.C., in reply. The decision in *In re Leopold Cassella & Co. Gesellschaft M. B. H.* (2) is not material to this question, for "Diamine" was held to be a descriptive word and therefore not registrable.

Cur. adv. vult.

1912. Feb. 19. JOYCE J. These are two applications for an order of the Court under paragraph (5.) of s. 9 of the Trade Marks Act, 1905, which provides that a registrable trade mark must contain or consist of, amongst other things, any other distinctive mark, but a name, signature, or word or words, other than such as fall within the preceding exceptions, shall not, except by the order of the Board of Trade or the Court, be deemed a distinctive mark.

One of the applicants seeks to have "Boardman's" registered for "manufactured tobaccos." The other applicants seek to have "McEwan's" registered for "beer." These cases are supposed to raise an important general principle, namely, whether a mere surname can be registered under paragraph (5.) of s. 9, which I have just read.

(1) [1911] 2 Ch. 382. (2) [1910] 2 Ch. 240.

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Under paragraph (1.) there may be registered, not "a," but "the" name of a company represented in a particular manner. In a sense John Smith's name is Smith, as, indeed, it is also John, but I take it to be clear that under paragraph (1.) no one would be entitled to have his surname registered alone by itself, even though it might be represented in a special or particular manner, and at all events under this paragraph (1.) neither "McEwan's" nor "Boardman's" in the possessive case could be admitted, even though represented in a special or particular manner: see *Alexander Pirie & Sons* v. *Goodall* (1) and *In re Colman's Trade Mark Application.* (2)

It is unnecessary for the purposes of these applications to consider paragraphs (2.) and (3.) of s. 9. The only observation upon paragraph (4.) is that this, while admitting generally a word or words having no direct reference to the character or quality of the goods, expressly excepts a geographical name or a mere surname. That is to say, under paragraph (4.) any distinctive word is admissible if it has no direct reference to the character or quality of the goods, provided it be not a geographical name or a surname.

Then I come to paragraph (5.), and the question at once suggests itself whether a geographical name or a surname not admissible under paragraph (4.) may be admitted under paragraph (5.), subject to the appropriate order being obtained from the Board of Trade or the Court. I am afraid it is too late to say that a geographical name may not be admitted under paragraph (5.), though I am not sure that it ever ought to have been. However, that is another matter. Under that section "Apollinaris" was admitted after being previously struck off; also "Oswego" was allowed by Warrington J. in *In re National Starch Co.'s Application.* (3) Then in *In re Itala Fabrica di Automobili* (4) the word "Itala," which may or may not have been a geographical name, was allowed. "California Syrup of Figs" was not treated as being a geographical name because "syrup of figs" was part of what it was sought to register.

(1) [1892] 1 Ch. 35.
(2) [1894] 2 Ch. 115.
(3) [1908] 2 Ch. 698; 25 Rep. Pat. Cas. 802.
(4) (1910) 27 Rep. Pat. Cas. 493.

Nothing can be admitted under paragraph (5.) but a distinctive mark, "mark" being, by s. 3, defined to include "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or other combination thereof," but when the proposed trade mark is one not in actual use, whatever may be the precise meaning or extent of the provision in s. 9, "For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons"—whatever I say may be the precise meaning or extent of that provision, and I think there are difficulties—it appears to me that the criterion of whether a proposed trade mark, not in actual use, is distinctive for the purpose of paragraph (5.) is simply whether it be adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

Here I ought to observe at once that, notwithstanding all the evidence upon these applications, I am of opinion that in neither case has the word the subject of the applications been in actual user as a trade mark. The word "McEwan's" has figured prominently upon or in connection with a device upon a trade mark or trade marks registered and used by the applicants. Similarly "Boardman's Smoking Mixture" has figured prominently upon or in connection with a device upon a trade mark used and registered by the applicants, but neither the word "McEwan's" nor the word "Boardman's" has ever been used as a trade mark, so that it is unnecessary for me, in the circumstances, to consider the extent to which user has rendered the word "McEwan's" or the word "Boardman's" distinctive, nor indeed does the evidence in my opinion, when rightly considered, do more than go to shew the great repute of the goods manufactured by the respective applicants. It appears to me that the very same thing might be said of Purdey or any of the noted gun manufacturers. You might say the same of the port which is shipped by Croft or by Cockburn, but those names are not used as trade marks. It may be that no other person of the same name has, at the present time, an equal repute for similar goods. But the question for me is whether the word "Boardman's" or the word "McEwan's" is adapted to distinguish the goods manufactured, selected, certificated or offered for sale by

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the applicants in each case from those of other persons, that is, from those of all other persons, unless it be that under paragraph (5.) the Court has an absolute discretion similar to that which, in some cases and for some purposes, is vested in the registrar.

It has been held by Warrington J. in *In re Pope's Electric Lamp Co.'s Application* (1), if not by Eve J. in *In re Whitfield's Bedsteads* (2), that a mere surname, or at all events an ordinary surname, is not adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. No one could, I think, reasonably maintain that the surname Smith, by itself, is adapted to distinguish the goods of the proprietor of that name from those of other persons. It was urged before me that nothing is better adapted to distinguish a person's goods from those of other persons than the name of the manufacturer, and I agree this may be so as to the full or ordinary name of the company, individual, or firm by which the goods were manufactured, selected, certificated, dealt with, and offered for sale. Now then is such a name, the full or ordinary name, admissible under paragraph (5.)?

The old Act provided that a trade mark must consist or contain at least one of the following essentials:—"(*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner"; then "(*e*) A word or words having no reference to the character or quality of the goods and not being a geographical name." In the case of *In re Holt & Co.'s Trade Mark* (3) Lindley L.J. says: "It would, in my opinion, be wrong in law to construe s. 10 of the Act of 1888 as allowing a person to register under (*e*)—that is, not in a particular and distinctive manner—any word which is the name of an individual within clause (*a*), and which under that clause must be 'printed, impressed, or woven in some particular and distinctive manner.' Such a construction would render the condition imposed by clause (*a*) nugatory. So far, I agree with the judgment of North J." Then the other two judges, Kay L.J. and A. L. Smith L.J., say the same thing. This decision of the Court of Appeal is generally

(1) [1911] 2 Ch. 382. (2) [1909] 2 Ch. 373.
(3) [1896] 1 Ch. 711, 719.

supposed to be still applicable under the present Act (Kerly on Trade Marks, 3rd ed. p. 138). If, however, it no longer applies and the province of the Court under paragraph (5.) is merely to determine whether the word proposed to be registered is adapted to distinguish the goods of the applicant from those of other persons, then the name of every company, individual, or firm not having, at the date of the application, any serious competitor of the same identical name would be registrable under paragraph (5.) without such name being represented in a special or particular manner. This, I think, would be a most extraordinary result.

Upon consideration I have come to the conclusion, and, therefore, I decide, that a mere surname of an individual applicant, though it may be adapted to distinguish the goods of all the persons, taken collectively, who bear that surname from the goods of other persons bearing a different surname, is not adapted to distinguish the goods of the applicant from those of other persons within the meaning of that expression in the Act. Little or no mischief might result from the registration where the surname of the applicant was a very uncommon one, but, even if an uncommon one, it is impossible to say that there may not be others bearing it who may wish to use it in connection with similar goods. Consequently I think that these applications fail and must be refused.

Moreover, if the application of Messrs. Lea & Co. for "Boardman's" were admissible, it could only, I think, be granted for the particular mixture of tobacco which is said to have acquired a reputation under the designation of "Boardman's Smoking Mixture": see the case of *In re Whitfield's Bedsteads* (1), before Eve J., and also the undertaking which Kekewich J. required where leave was granted for "Apollinaris" to be admitted.

Then, having regard to what was said by the Attorney-General, there will be no order as to costs.

Solicitors: *McKenna & Co.; Solicitor to the Board of Trade.*

(1) [1909] 2 Ch. 373.

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[1912 R. 483.]

Vendor and Purchaser—Restrictive Covenants—Building Plans to be approved by Vendor's Surveyor—Costs of Approval—Construction of Conveyance—Custom.

A conveyance of part of an estate at Reading contained a covenant by the purchasers not to erect any building otherwise than in accordance with such drawings and specifications as might be previously approved of in writing by the vendor's surveyor.

Held, on the construction of the conveyance, that the purchasers were not liable to pay the fees of the vendor's surveyor for approving the plans.

Held, also, on the evidence, that an alleged general custom that the purchasers should pay the surveyor's fees in such cases did not extend to Reading, and it was doubtful whether it obtained even in London.

Witness Action.

By a conveyance on sale dated May 18, 1908, Sir Walter Palmer, Bart., the vendor, conveyed three-and-a-half acres of the Norcot Estate, Reading, to the plaintiffs, the purchasers, in fee simple. The plaintiffs for themselves and their assigns and to the intent and so as to bind not only themselves but also as far as practicable all future owners and tenants of the three-and-a-half acres and to bind the three-and-a-half acres into whosesoever hands the same might come covenanted with the vendor, his heirs and assigns the owner or owners for the time being of the Norcot Estate, that the plaintiffs and their assigns would at all times perform and observe the stipulations and restrictions in relation to the three-and-a-half acres contained in the first schedule.

The first schedule contained (inter alia) the following stipulations :—

"(1.) To erect forthwith at their own expense and under the inspection and to the satisfaction of the surveyor for the time being of the vendor his heirs or assigns (hereinafter called the surveyor) a good and sufficient fence or wall along all the

boundaries of the said premises and for ever thereafter to maintain such fence or wall in proper and substantial repair.

"(2.) Not to erect any building whatsoever on that part of the said premises which lies within 100 feet of the north west side of the street or road called Grovelands Road nor to erect on the remainder of the said premises any building whatsoever otherwise than in accordance with such drawings and specifications as may be previously approved of in writing by the surveyor.

"(3.) Not to carry on in or upon the said premises any trade or business other than that of a machine bakery with stables and other buildings in connection therewith without the consent in writing of the surveyor and the said trade or business of a machine bakery to carry on in a quiet and proper manner and so as not to become a nuisance to the vendor his heirs or assigns or his or their lessees or tenants."

With the exception of an approach twenty feet wide and ninety-two feet long from Grovelands Road, the three-and-a-half acres plot was all back land surrounded on all sides by the land of the vendor, who retained all the land fronting on the adjoining roads for building purposes.

About the beginning of 1909 the plaintiffs submitted plans of their proposed buildings to Messrs. Tuckett & Son, of London, the vendor's surveyors.

On January 12, 1909, the vendor's surveyors wrote: "We have not yet had time to examine your plans carefully, but the site of the land appears to be incorrectly shown, and we certainly cannot agree to windows being opened overlooking our client's adjoining land as shown on plan. The customary charge for approving plans and seeing that they are properly carried out is $1\frac{1}{4}$ per cent. on the cost of such buildings, but as you will be spending a considerable sum of money we propose to charge you an inclusive fee of 100 guineas."

The plaintiffs declined to pay any fee and communicated with the vendor, and after some correspondence the surveyors wrote on March 3, 1909, stating that the plaintiffs and not the vendor were liable for the fee, but as no mention was made with regard thereto in the contract, and as the plaintiffs were under the impression that no fee would be charged them, the surveyors had

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on this occasion consented to waive their fee altogether, but that in future they would expect to be properly paid for their services. They added: "With regard to your application for our approval to the erection of a 7-foot corrugated iron fence, we are afraid we cannot possibly agree to it, and we can imagine few things more likely to depreciate our client's adjoining building land. We would suggest that 6-foot unclimbable iron railings (of a design to be approved by us) would be a very suitable fence or failing this a close boarded oak pale fence."

The vendor died on April 16, 1910. The defendants were his executors and trustees for sale of his real estate.

On June 26, 1911, the plaintiffs, being desirous of making some small alterations to the buildings, forwarded plans for the surveyors' approval.

On July 3, 1911, the surveyors returned the plans, stating they had no instructions to deal with them and that they must be forwarded to the defendants' solicitors, who would doubtless obtain instructions.

On July 4, 1911, the plaintiffs forwarded the plans to the defendants' solicitors to obtain the defendants' instructions.

On July 6, 1911, the defendants' solicitors replied: "We shall be pleased to consider the plans on receiving from you an undertaking to pay our charges and the surveyors' fee in connection therewith. Your letter does not state what is required of our clients. We shall be obliged, if you have occasion to refer any matter to the executors and trustees of the will of the late Sir Walter Palmer, if you will communicate with us, as our Mr. Harrison is one of the executors. It does not necessarily follow that Messrs. Tuckett & Son have any instructions to represent them in the matter. Messrs. Tuckett & Son might cease to be agents of the property and at any rate it is for us to instruct them in the matter in the usual way."

On July 7, 1911, the plaintiffs replied that they had forwarded the plans to the surveyors for the time being of the owner of the estate in accordance with the stipulations, and that the approval of the plans was in the defendants' interest, and if they chose to employ a surveyor they must pay him for his services.

After some further correspondence in which the plaintiffs

refused to give any undertaking, the defendants' solicitors wrote on July 18, 1911, to the plaintiffs' solicitors, into whose hands the matter had been placed: "Surely the position is the same as in the case of a lessee requiring a licence to assign. It is we think without exception the practice for the applicant in these cases to pay the charges of the lessor's solicitors for the licence and we venture to suggest that the practice is the same with regard to the licence for the making of alterations. Our clients are trustees and we cannot ask them to consent to plans of a technical character without being properly advised. Unless your clients are prepared to agree to pay these charges the trustees cannot give their consent to the alterations."

Further correspondence ensued and ultimately on September 30, 1911, the plaintiffs paid five guineas surveyors' fees and one guinea for the costs of the defendants' solicitors without prejudice to the question of their liability, which was to be submitted to the Court on a construction summons under Order LIV.A. The amount paid was to be refunded if the plaintiffs were successful. The summons was issued on October 14, 1911, and on the defendants' application was placed in the witness list, so that it did not come on for hearing till March 22, 1912. Shortly after the summons was opened it appeared that the defendants relied not only on construction but on an alleged custom that the plaintiffs as purchasers were liable for the surveyors' fees. As this custom was denied by the plaintiffs, the judge pointed out that the question could not be decided on a construction summons under Order LIV.A, and adjourned the case for a short interval to allow the plaintiffs to issue a writ, the defendants to be treated as putting in a defence traversing the writ, and pleading their custom, of which they were to give written particulars.

By their writ the plaintiffs claimed a declaration that they were not liable under the provisions of their conveyance or otherwise to bear or pay any part of the costs of approval of drawings and specifications by the surveyor referred to in clause 2 of the first schedule.

The defendants stated their alleged custom as follows: "By general usage where a conveyance contains covenants by the purchaser not to build except in accordance with plans and

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specifications to be approved by a surveyor the fees of the surveyor (including any legal charges properly incurred by him) are paid by the person requiring the approval in the absence of express provision to the contrary."

Hon. Frank Russell, K.C., and *Luxmoore*, for the plaintiffs. The restrictive covenants were solely for the benefit of the vendor, who was obviously liable for his own surveyor's fees. There is nothing in the conveyance to throw these fees on the purchasers. The conveyancing precedents often, as in the present case, say nothing about the fees: see 1 Key and Elphinstone's Conveyancing, 9th ed. p. 348, Form 11; 12 Encyclopædia of Forms and Precedents, p. 386; 2 Davidson's Conveyancing, pt. i. 4th ed. pp. 80, 542. In other cases they expressly provide that the purchaser shall pay a limited fee: see 1 Key and Elphinstone's Conveyancing, 9th ed. p. 348, Form 12; 1 Prideaux's Conveyancing, 20th ed. p. 573; 12 Encyclopædia of Forms and Precedents, p. 306. The inference is that where the purchaser is to pay, a special provision is required. The defendants allege a general custom to the effect that the purchaser pays in these cases. But as the conveyance is free from any ambiguity, parol evidence of custom is inadmissible: *Cockburn* v. *Alexander*. (1) Subject to this objection the burden of proof of the alleged custom is on the defendants.

Micklem, K.C., and *Stiebel*, for the defendants. The covenants were for the benefit of the purchasers as well as the vendor. They would attach on sub-sales, and the vendor's surveyor would exercise supervision over the three-and-a-half acres, no matter into how many plots they were divided. Each sub-purchaser would be entitled to the benefit of the covenants, and it would be an extraordinary thing to throw the costs of the surveyor's supervision on the vendor who had parted with these three-and-a-half acres. The adjoining land will probably be developed on similar lines. The person who submits plans to the surveyor must pay his fee whether the plans are approved or rejected. That person is really the employer ad hoc. The surveyor is not employed as agent of the vendor or his representatives for this purpose each

(1) (1848) 6 C. B. 791, 812, 816, 818.

time that a plan is submitted. He was merely nominated as a quasi-arbitrator on behalf of all parties, and the case is exactly the same as if any other person had been named in the conveyance for this purpose. As an arbitrator his fees would be paid by the person who takes up his award, though no doubt the persons appointing him are jointly liable: *Crampton & Holt* v. *Ridley & Co.* (1) He would not give up his plans until he was paid.

Again, his certificate is part of the purchaser's title: *In re Moody and Yates' Contract.* (2) It is a condition precedent to their obtaining a good title. Surely the vendor or his representatives ought not to pay the costs of their performing this condition. If the plaintiffs are right the defendants are for ever saddled with this liability every time a purchaser or sub-purchaser chooses to build or rebuild. They might have to pay for the rejection of a dozen plans besides the one finally approved. The true inference from the conveyancing precedents is that where a building estate is developed in small lots it is usual to limit the amount of the fee payable by the purchaser. The provision is inserted for his benefit and to protect him from having to pay the usual fees. There is no precedent in which the cost is thrown on the vendor.

Again the custom that a lessee pays for the costs of his lease is well known, and the custom that he pays for a licence to assign or underlet is recognized by the proviso to s. 3 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). The present case is very analogous and we can prove a similar custom as to surveyors' fees. In *Cockburn* v. *Alexander* (3) the usage would really have contradicted the contract. In the present case the contract is absolutely silent on the point and the evidence is admissible to shew a well-known usage with reference to which the parties presumably contracted: *Hutton* v. *Warren.* (4)

The defendants then called evidence to the effect that the custom prevailed in London and the home counties. The

(1) (1887) 20 Q. B. D. 48.
(2) (1885) 28 Ch. D. 661; 30 Ch. D. 344.
(3) 6 C. B. 791, 812, 816, 818.
(4) (1836) 1 M. & W. 466, 475.

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plaintiffs called evidence to shew that it did not prevail at Reading. The evidence is dealt with in the judgment.

Hon. Frank Russell, K.C., in reply. The custom is not proved even in the London district. At all events it does not extend to Reading. *In re Moody and Yates' Contract* (1) has no application to the sale of freeholds. There is no question of any right of re-entry as in the case of leaseholds.

Micklem, K.C., in rejoinder. We have proved our custom for London and the home counties, but have failed to prove it for the Reading district. We have not proved a definite scale, but in our own district we have shewn that except in cases where the surveyor receives a fixed salary from the vendor the purchaser always pays a reasonable fee for the work actually done by the vendor's surveyor in approving plans. The large area of our custom shews that it is a reasonable usage, and that our construction of the contract is not as unreasonable as the plaintiffs suggest.

SWINFEN EADY J., after stating the facts and reading the conveyance and the correspondence and pointing out that the conveyance contained no covenant by the vendor in any way restricting the user or development of his adjoining land, and that in their letters of January 12, 1909, and March 3, 1909, it was manifest that the vendor's surveyors were considering the proposed building and fence solely from the point of view of the effect on the vendor's adjoining land and that the defendants' solicitors' letter of July 18, 1911, was a misconception of the position, as the defendants' consent to the alterations was not necessary, the covenant merely requiring the surveyors' approval of the plans, continued:—The defendants contend that, on the true construction of the conveyance, the plaintiffs ought to pay the surveyors' fees. They say that the case is analogous to a licence under a lease, and as in that case a reasonable charge is paid by the lessee who wants the licence, so here the expense ought to fall on the persons who want their plans approved. They also say that the surveyors were not instructed or retained

(1) 28 Ch. D. 661; 30 Ch. D. 344.

by the vendor or the defendants as their agents for the approval of plans, and therefore the defendants are under no liability. They also say that the surveyors were quasi-arbitrators and were not bound to approve or give up the approved plans without payment.

In my opinion this is a wholly erroneous way of looking at the conveyance and the position of the surveyors. The covenant was for the vendor's benefit. The land was conveyed to the purchasers in fee simple, but for the benefit of the vendor the purchasers entered into restrictive covenants. It is obvious that in considering the fence to be erected under the first stipulation the vendor's surveyors would have regard, as they did, to its effect on the adjoining land. The surveyor was defined in the first stipulation as "the surveyor for the time being for the vendor his heirs or assigns," and the same person was referred to in the second stipulation. He was instructed and retained by the vendor and authorized to approve plans on his behalf. He could only approve plans when so authorized. The vendor might appoint a different surveyor for every transaction. The surveyor was not appointed by the vendor and purchasers jointly, but by the vendor alone, and the vendor who alone engaged him was the person to pay for his services. It is true that contracts often provide for this point, and where the expense is thrown on the purchaser a fixed fee per house is usually provided, but there is no such provision in the present case, and there is nothing in the conveyance requiring the purchasers to pay the surveyors' fees as a condition precedent to obtaining their approval of the plans. The first and second stipulations must be read together, and in both cases the vendor or his representatives must pay their own surveyors for work done for them. On the construction of the conveyance there is nothing to throw these expenses on the plaintiffs.

The defendants then sought to import a custom in accordance with the rule that in commercial and other transactions extrinsic evidence of custom and usage with reference to which the parties presumably contracted is admissible to annex incidents to written contracts in matters with respect to which they are silent. For example in the case of an agreement for a lease it is customary

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for the lessor's solicitor to prepare the lease at the expense of the lessee and in the case of a marriage settlement of personal property it is customary for the wife's solicitor to prepare the settlement at the husband's expense.

It is contended that in the present case the parties did not mean to express all the terms of their contract in the conveyance, but contracted with reference to a well-known usage. The usage pleaded is that " where a conveyance contains covenants by the purchaser not to build except in accordance with plans and specifications to be approved by a surveyor, the fees of the surveyor (including any legal charges properly incurred by him) are paid by the person requiring the approval in the absence of express provision to the contrary." The evidence adduced was confined to the surveyor's fees and did not deal with the legal charges. Three eminent London surveyors, Mr. Ellis, Mr. Tuckett, and Mr. Savill, were called by the defendants in support of the alleged custom, which they said obtained in London and the home counties. The customary charge foreshadowed by Messrs. Tuckett & Son in their letter of January 12, 1909, was $1\frac{1}{4}$ per cent. on the cost of the buildings. Mr. Ellis negatived this statement. He was not aware of any general usage as to the amount of the charge and never heard of the $1\frac{1}{4}$ per cent. or any definite scale. Mr. Tuckett until recently thought that the customary charge was $1\frac{1}{4}$ per cent. on the cost up to any amount. But he had lately learnt that the scale of the Royal Institute of British Architects was $1\frac{1}{4}$ per cent. up to 5000*l.*, and above that the fee was fixed by special arrangement. Mr. Savill said that he did not work on a scale, and the scale formed no part of the custom. In these circumstances the defendants' counsel were well advised in admitting that they had not established any scale. On the other hand Mr. Tuckett introduced a new exception to the custom, namely, that on some large estates the vendor's surveyor was paid a fixed salary covering everything and was not entitled to charge other fees. In that case the purchaser did not pay for having his plans approved as the charge was included in the fixed salary. Now this exception throws considerable light on the alleged custom. It is difficult to see how the purchaser's liability can depend on the question

whether the vendor's surveyor is paid by fees or by a fixed salary. In either case it is the vendor who pays him. Mr. Savill also said that it was usually expressly provided by the contract that the purchaser should pay the surveyor's fees. That being so, there can only have been exceptional cases in which the alleged custom has been applied.

Having regard to the different views expressed by the London surveyors I am not satisfied that the custom exists even in the London district. But it is quite clear that no general usage extending to Berkshire and Reading has been proved. The defendants' witnesses had no experience beyond London and the home counties. The plaintiffs called two surveyors and a solicitor practising in Reading who not only denied that the usage alleged by the defendants prevailed in Reading, but proved that the usage there was just the opposite, and that it was the practice for the vendor to pay these charges.

I therefore hold that neither on the construction of the conveyance nor by general custom or usage are the plaintiffs bound to pay the costs of the defendants' surveyors for approving plans, and that the surveyors employed for the time being by the defendants must be paid by the defendants who employ them.

Solicitors: *Oldfields, for Dodd & Kift, Reading; Waterhouse & Co.*

G. R. A

WARRINGTON J.

1912

May 1.

FRUIT AND VEGETABLE GROWERS ASSOCIATION, LIMITED *v.* KEKEWICH.

[1912 F. 577.]

Company — Meeting — Persons entitled to make Requisition — Requisition in several Documents — "Like Form" — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 66, *sub-ss.* 1, 2.

By s. 66, sub-s. 1, of the Companies (Consolidation) Act, 1908, "Notwithstanding anything in the articles of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company," and by sub-s. 2 "The requisition . . . . may consist of several documents in like form, each signed by one or more requisitionists."

A company had a nominal capital of 60,000 shares, of which 48,000 shares had been offered for subscription. The issued share capital was 22,357 shares, on 5094 of which all calls and sums due had been paid. A requisition under sub-s. 1 of s. 66 calling upon the directors to convene an extraordinary general meeting was signed by the holders of 690 out the 5094 shares. The requisition consisted of a number of documents which were in two forms. By the first form the directors were requested to call an extraordinary general meeting of the company for the purpose of considering the reconstitution of the board and resolutions concerning the directorate and officers of the company. The second was in identical terms except that there were added at the end of it the words "in addition to the affairs of the company in general":—

Held, that the "one-tenth" referred to in sub-s. 1 was one-tenth of that part of the issued share capital of the company upon which all calls or other sums then due had been paid, and not one-tenth of the issued share capital of the company the holders of which one-tenth had paid all calls, &c., upon their shares, and, therefore, that the requisition was signed by a sufficient number of duly qualified shareholders.

Held, also, that the documents constituting the requisition were "in like form" within the meaning of sub-s. 2.

MOTION.

The Fruit and Vegetable Growers Association, Limited, was incorporated on November 23, 1911, with a nominal capital of 60,000*l.* divided into 60,000 shares of 1*l.* each.

On November 25 a prospectus was issued by the company offering for public subscription 48,000 shares at par, the remaining 12,000 shares being held in reserve. Of the shares so

offered 22,000 were underwritten by the promoter of the company, who in turn procured persons to sub-underwrite 21,000 of the 22,000 shares.

Applications for 5094 shares in all were received from the public, and the promoter and the sub-underwriters were called upon to make good the deficiency for which they had contracted liability and to pay for 1577 shares and 15,686 shares which were allotted to them respectively. The sub-underwriters denied liability, and proceedings were taken against them by the company. Judgments had been recovered against some of them, but full payment of the calls had not been made. No proceedings had as yet been instituted against the promoter, who had not denied liability.

The issued share capital of the company was 22,357 shares, and the number of shares upon which all calls or other sums due had been paid was admitted not to exceed 5094.

On March 12, 1912, the statutory meeting of the company was held, at which a proposal was made by the promoter that the meeting should stand adjourned for the purpose of the consideration by the shareholders of the reconstitution of the board of directors and the affairs of the company in general. The proposal was supported by a large majority of the shareholders present. The chairman, however, refused to adjourn the meeting.

Between March 18 and March 30 there were deposited at the registered office of the company a number of documents in the following form: "We, the undersigned, hereby request you (in accordance with section 66 of the Companies (Consolidation) Act, 1908) to call an extraordinary general meeting of the shareholders for the purpose of considering the reconstitution of the board and resolutions concerning the directorate and officers of the company." Between the same dates there were also deposited other documents which were in the same form, except that after the word "company" there were added the words "in addition to the affairs of the company in general."

The aggregate number of shares upon which all calls had been paid by the signatories to the first form of document was 235, and to the second form of document 455, making a total of 690 shares.

The directors refused to call the required meeting on the ground

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that the documents did not constitute a valid requisition within s. 66 of the Companies (Consolidation) Act, 1908, in that (1.) they were not in "like form" within the meaning of sub-s. 2 of that section; (2.) they did not agree as to the business to be transacted at the required meeting; (3.) they did not indicate with reasonable and sufficient clearness the nature of the business which the meeting was required to be called to transact; and (4.) they were not signed by the requisite number of duly qualified shareholders as required by sub-s. 1 of s. 66.

On April 23, 1912, the defendants issued a circular notice to the shareholders convening an extraordinary general meeting of the company for May 2. This notice was signed by the four defendants and nineteen other shareholders, who together constituted a majority of the requisitionists in value, as required by s. 66, sub-s. 3.

On April 25 this action was commenced by the plaintiff company against the four defendants claiming by their writ an injunction to restrain them from attending or summoning or holding or permitting to be summoned or held a meeting purporting to be an extraordinary general meeting of the plaintiff company on May 2, 1912, and from representing the meeting to be an extraordinary general meeting of the plaintiff company or otherwise as a duly constituted meeting of the plaintiff company, and from holding themselves out as having authority to summon or hold the meeting as an extraordinary general meeting of the plaintiff company or otherwise as a duly constituted meeting of the plaintiff company, and from entertaining or permitting to be entertained at the meeting, if held, the business proposed to be considered in the notice dated April 23, 1912.

The plaintiff company now moved for an injunction in the terms of the writ.

Cave, K.C., and *A. Lawton*, for the motion. The "one-tenth" referred to in sub-s. 1 of s. 66 is one-tenth of the whole of the issued share capital of the company, and the meaning of the subsection is that the requisition must be signed by persons holding one-tenth of the issued share capital of the company upon which they have paid all calls. In the present case the issued share

capital was 22,357 shares, and even taking the number of shares upon which all calls had been paid held by the signatories to both documents constituting the requisition—namely, 690—they did not amount to anything like the one-tenth of the issued share capital required by the sub-section. The requisition was therefore insufficiently supported and the directors were under no obligation to act upon it.

Further, the requisition did not clearly state the objects for which the meeting was to be convened.

[They were stopped.]

H. Terrell, K.C., and *Owen Thompson*, for the defendants. The first question is whether there is any substantial difference between the two documents constituting the requisition. Sub-s. 2 of s. 66 does not require that the documents shall be in "identical terms" but "in like form," and it is submitted that the documents here are "in like form." Then as to whether the requisition was signed by the "one-tenth" required by sub-s. 1 of s. 66 it is submitted that in ascertaining this one-tenth the only persons who can be taken into consideration are the holders of shares upon which all calls have been paid up, namely, the holders of the 5094 shares. The requisition has been signed by the holders of 690 of these shares, which is more than the required one-tenth.

[They were stopped on this point.]

[WARRINGTON J. What do you say as to the requisition?]

The requisition so far as it asks that the meeting should be convened "to consider the affairs of the company" is, it is admitted, too wide, but is good so far as it asks that the meeting should be convened "to consider the reconstitution of the board." A requisition may be good notwithstanding that it is so expressed that the resolutions following its precise terms would be illegal: *Isle of Wight Ry. Co.* v. *Tahourdin.* (1)

[WARRINGTON J. The whole question here is whether there was a requisition upon which the directors were bound to act?]

It must be a very strong case which would justify the Court in restraining a meeting of shareholders: *Isle of Wight Ry. Co.* v. *Tahourdin.* (1)

(1) (1883) 25 Ch. D. 320, 330.

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There is the further point that no authority has been cited by the plaintiff company shewing that they are entitled to the injunction they ask.

Cave, K.C., in reply. The one-tenth referred to in sub-s. 1 of s. 66 points to proportion of a definite figure, namely, the issued share capital of the company, which can be easily ascertained. Assuming, however, I am wrong on that point, then which of the two documents is the one to which the directors are to have regard? The documents must require the meeting to be convened for the same objects. Here there is a substantial variation between them. They are therefore not "in like form" as required by sub-s. 2 of s. 66, and consequently the signatories to each document cannot be added together, but must be treated separately. Even on the assumption, therefore, that sub-s. 1 refers to one-tenth of the paid up capital, the requisition has not been signed by the requisite number of qualified shareholders as provided by the sub-section. It is admitted that if one of the objects of the meeting is good the meeting ought to be convened. But here the documents state the objects of the meeting in such vague terms as not to comply with sub-s. 2 of s. 66, and the directors are not therefore bound to act upon them: *Young* v. *South African and Australian Exploration and Development Syndicate.* (1)

WARRINGTON J. The question in this case really is whether the directors were bound under the provisions of s. 66 of the Companies (Consolidation) Act, 1908, to summon an extraordinary general meeting of the company. I put it advisedly in that form because I am not concerned with the question what business can properly be transacted at the meeting. It is not a question at present whether the meeting has been called by a proper notice. I have only to consider whether the directors were bound to convene a meeting.

The present application is made in the name of the company for an injunction to restrain the defendants from attending or summoning or holding or permitting to be summoned or held a meeting purporting to be an extraordinary general meeting of the company on May 2, 1912.

(1) [1896] 2 Ch. 268, 276

In *Isle of Wight Ry. Co.* v. *Tahourdin* (1) Lindley L.J. makes these remarks. He says (2): "It appears to me that this case is very much more important than at first sight appears. It raises a question of the utmost possible consequence as to the management of railway and other companies. We must bear in mind the decisions in *Foss* v. *Harbottle* (3) and the line of cases following it, in which this Court has constantly and consistently refused to interfere on behalf of shareholders, until they have done the best they can to set right the matters of which they complain, by calling general meetings. Bearing in mind that line of decisions, what would be the position of the shareholders if there were to be another line of decisions prohibiting meetings of the shareholders to consider their own affairs? It appears to me that it must be a very strong case indeed which would justify this Court in restraining a meeting of shareholders. I do not mean to say of course that there could not be a case in which it would be necessary and proper to exercise such a power. I can conceive a case in which a meeting might be called under such a notice that nothing legal could be done under it. Possibly in that case an injunction to restrain the meeting might be granted. I do not say that it would, that case may be dealt with when it arises." I only read those remarks because they shew that the Court ought not to be astute to discover and give effect to objections raised against efforts made by shareholders to call a meeting of the company to consider its own affairs.

I now come to the facts of this case. Sect. 66, sub-s. 1, of the Act of 1908 provides that "Notwithstanding anything in the articles of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company." Then the section further provides by sub-s. 2 that "The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed

(1) 25 Ch. D. 320. (2) 25 Ch. D. 333.
(3) (1843) 2 Hare, 461.

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by one or more requisitionists." The first question that arises upon the construction of that section is, what is it to which the words "upon which all calls or other sums then due have been paid" in sub-s. 1 refer? Do they refer to the expression "issued share capital" or do they refer to the expression "one-tenth"? On behalf of the plaintiffs it is suggested that they refer to the "one-tenth." On behalf of the defendants it is suggested that they refer to the issued share capital. In other words the defendants say that the requisitionists must be the holders of not less than one-tenth of that part of the issued share capital upon which all calls have been paid. In my opinion the latter is the true construction. I think for the purposes of sub-s. 1 one is to take the amount of the issued share capital for the time being in respect of which all payments then due have been made and that the requisitionists are to be the holders of not less than one-tenth of that amount. That construction seems to me to be both a reasonable and a grammatical one. If one adopts the other construction of the sub-section, namely, that contended for by the plaintiffs, the result would be that the holders of the remaining nine-tenths of the issued share capital who had not paid the calls on their shares might prevent the holders of paid up issued share capital from ever having a meeting called. The construction contended for by the defendants also seems to be good sense because it necessarily assumes that those who requisition for the meeting have paid up the calls upon their shares. If the construction of the sub-section is as I hold it to be, then there is no question that the requisitionists (excluding those of them who have not paid up their calls) are holders of not less than one-tenth of the issued share capital upon which all calls and other sums due have been paid, and if there were no other question the requisition would in my opinion be valid.

Then there is another question which is a somewhat serious one. The requisitionists availed themselves of sub-s. 2 of s. 66 by signing a number of separate documents, and it is unfortunate that those documents were not all in identical terms. They are in two forms. One form—omitting immaterial parts—is this: "We, the undersigned, hereby request you (in accordance with

section 66 of the Companies (Consolidation) Act, 1908) to call an extraordinary general meeting of the shareholders for the purpose of considering the reconstitution of the board and resolutions concerning the directorate and officers of the company." The other form is in the same language but with the addition of the words "in addition to the affairs of the company in general." That is ambiguous. Whether those last words mean that the requisitionists required the meeting to consider the affairs of the company in general is not in my opinion certain. I will assume, however, that the second form of requisition did propose to discuss the affairs of the company in general for the purpose of determining the question whether the documents were "in like form" within the meaning of sub-s. 2 of s. 66. In my judgment they were in "like form." I think so for this reason, that in my opinion the addition of the words "in addition to the affairs of the company in general" made no difference in the general purport of the requisition. At all events, it was a requisition to the directors to call a meeting for the purpose of considering the reconstitution of the board. Apart therefore from the third point the requisition was certainly a good and valid requisition, and it was the duty of the directors to convene a meeting. This they failed to do, and the requisitionists are right in the view for which they contend.

The third point taken on behalf of the plaintiffs was that the requisition was not a sufficient requisition within the section because it did not sufficiently state the objects of the meeting. But it seems to me that the words "for the purpose of considering the reconstitution of the board and resolutions concerning the directorate and officers of the company" mean for the purpose of considering whether the shareholders of the company are satisfied with the personality and conduct of the board, and that for that purpose the requisition sufficiently states the objects for which the requisitionists desired to have the meeting called.

I think, therefore, that the defendants are right, and I refuse the motion with costs.

Solicitors: *Richard Brooks; Lloyd, Richardson & Co.*

W. I. C.

NEVILLE J.

1911

Oct. 23;
Nov. 17.

RUDD *v.* BOWLES. (1)

[1910 R. 1472.]

Easement—Way—Implied Grant of Right of Way—Plan on Lease—Alteration of Date of Lease after Execution—Alteration by Agreement—Estoppel—Building Agreement—Acceptance of Lease omitting Part of Land in Agreement.

Defendant B. had granted to G. separate leases of four plots of land fronting on H. road and four houses which had been erected thereon by G. under a building agreement. The plan on each lease, which was made part of the description, shewed a row of twelve plots with houses thereon fronting on H. road, including the house demised which alone was coloured, and a strip of land coloured brown running past the back of all the plots to E. road. The position of this strip on the plan suggested that it was intended to give access to the back of the plots, but there were no words on the plan expressing such an intention. This strip of land was included in the building agreement but not in the leases.

The leases were executed in May, 1903, and then bore no date except the year 1903, but the dates July 27, 28, 29, 30, 1904, respectively, were afterwards inserted by agreement between the parties. At the latter dates the houses had been completely erected and surrounded with a fence in which gates or openings had been made in the back fences giving access to and from the brown strip. This strip, which belonged to B., had never been fenced or marked off from the rest of B.'s land. The plaintiff was a mortgagee of G., who had entered into possession and claimed a right of way over the brown strip:—

Held, that the alteration of the leases did not make them void, but B. was estopped from denying that the leases were executed at the dates inserted in them with his consent; that the circumstances existing at those dates could be looked at in construing the lease and plan; and that an implied right of way over the brown strip was granted by the leases to the lessee and those claiming under him.

Held, also, that by accepting the leases as executed G. had abandoned any right he had to a lease of the strip coloured brown.

By four indentures of lease dated respectively July 27, 28, 29, and 30, 1904, and made between the defendant W. D. Bowles and A. J. Glock, four several pieces or parcels of ground situate on the north side of Halons Road, in the parish of Eltham, in the county of Kent, as the same were delineated in the plans drawn in the margins of the said indentures respectively and

(1) This report was held over to await the result of an appeal, which has now been compromised.

thereon coloured green and pink, and all those then newly erected dwelling-houses then standing on part of the same parcels of land, the sites thereof being distinguished in the same plans by the colour pink and then intended to be and afterwards numbered 20, 22, 24, and 26 in the said Halons Road, together with all rights, easements, and appurtenances to the said parcels of ground and premises belonging or with the same usually occupied or enjoyed, were demised by the defendant W. D. Bowles to the said A. J. Glock for the respective terms of ninety-nine years from March 25, 1902.

The plan on each lease shewed twelve plots of land and houses on the north side of Halons Road, only the house thereby demised being coloured. It also shewed a road called Enslin Road leading out of Halons Road at right angles at the western end of the twelve houses, one house beyond No. 26. Upon the plan there was a narrow strip, coloured brown, running from Enslin Road at the back of all the houses except the two at the east end, furthest from Enslin Road. The plaintiff was a mortgagee of the four leasehold houses who had entered into possession in 1906. The land at the rear of the houses also belonged to the defendant Bowles, and he had commenced to build a dwelling-house upon this land and was building the flank wall of the new house close up to the fences in the rear of Nos. 26 and 28, Halons Road, upon the strip of land coloured brown on the plans. The plaintiff brought this action for a declaration that he and those claiming under him were entitled to a right of way from Enslin Road over the strip coloured brown on the plan, which was about four feet wide, as a back way to the houses 20, 22, 24, and 26, Halons Road, and an injunction to restrain the defendant from building or permitting buildings to remain on the strip so as to interfere with such right of way.

These houses had been built by A. J. Glock under a building agreement to the satisfaction of the defendant Bowles. The strip of land coloured brown had been included in the building agreement but deliberately omitted from the leases by consent. The statement of claim alleged that it had been the intention of the defendant and the builder that there should always be a private way for the owners and occupiers of the four houses over

NEVILLE J. 1911 RUDD v. BOWLES.

the strip of land coloured brown, and that the houses had prior to the date of the said leases, and to the satisfaction of the defendant Bowles and his architect, been enclosed with a close-boarded fence in the rear portion of which gates were made for the purpose of giving access to and from each of the gardens of the said four houses over the strip of land coloured brown to Enslin Road.

It appeared that the leases had been executed in May, 1903, and the dates were then merely 1903, the month and day being left blank. The leases were afterwards altered, by agreement between the parties, by inserting the days and month given above and altering 1903 into 1904.

The judge held on the evidence that at the time the leases were actually executed the houses were nearly completed but the fences were not erected, but that at the dates which the leases bore the fences at the back were erected and the position of the gates defined. The gates had been regularly used by the occupiers of the houses, but the strip coloured brown had never been fenced or in any way marked off from the rest of the defendant Bowles' land at the back of the gardens, and therefore the occupiers in using their back gates had not confined themselves exactly to the brown strip.

Jenkins, K.C., and *S. R. Earle*, for the plaintiff. It is admitted that the way in question is not a way of necessity, but our contention is that the plaintiff is entitled to it on two grounds. First, we say that the principle of *Espley* v. *Wilkes* (1) applies, and that the effect of the lease together with the plan thereon, which was prepared by the lessor and shews this way as a strip coloured brown, was to grant this way by implication: it is in the nature of an estoppel. Secondly, on the evidence, the way was actually used at the time of the lease and passed under the general words now incorporated by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 6, sub-s. 2, in every conveyance: *International Tea Stores Co.* v. *Hobbs* (2); *Brown* v. *Alabaster*. (3) There was here no contrary intention.

(1) (1872) L. R. 7 Ex. 298, 303. (2) [1903] 2 Ch. 165, 172.
(3) (1887) 37 Ch. D. 490.

Peterson, K.C., and *J. M. Gover*, for the defendant. A right of way is not an apparent and continuous easement unless it is over a formed road, and will not pass by way of an implied grant without such words as "therewith used and enjoyed": Norton on Deeds, pp. 259—261; *Langley* v. *Hammond* (1); *Thompson* v. *Waterlow* (2); *Watts* v. *Kelson* (3); *Kay* v. *Oxley* (4); *Barkshire* v. *Grubb* (5); *Nicholls* v. *Nicholls*. (6) In *Brown* v. *Alabaster* (7) there were special circumstances. The plaintiff, therefore, to succeed on the first point must prove a formed path at the time of the lease, but on the evidence there was no made up defined way, no visible path at all. That leaves only the question whether it passed under the general words implied in s. 6, sub-s. 2, of the Conveyancing Act, 1881, but it cannot be said to be "a way . . . . at the time of conveyance . . . . enjoyed with or reputed or known as part or parcel of or appurtenant to" the house conveyed. The strip of land coloured brown was part of the land comprised in the building agreement and was not necessarily a right of way comprised in the lease. The plaintiff must shew that at the time of conveyance it was a way enjoyed with or appurtenant to the houses, but on the evidence it was only used by the builder's men as an entry to the back of the houses during the time they were being erected. The leases were actually executed in May, 1903, and were operative from that date because rent was paid under them. The alteration being made with the consent of all parties did not avoid the deed, but it could not alter the time from which it took effect; the back fences were not erected until September, 1903, so that no inference can be drawn from the gates which were put in after the leases were granted. The site of the strip was included in the building agreement and Glock was entitled in equity to a lease of it. He could not have an equitable title to a lease and an easement over the same ground, and the mere acceptance of a lease with the strip coloured brown cannot have amounted to an abandonment of his right to a lease and an acceptance of an

(1) (1868) L. R. 3 Ex. 161.
(2) (1868) L. R. 6 Eq. 36; 37 L. J. (Ch.) 495, 498.
(3) (1871) L. R. 6 Ch. 166, 172.
(4) (1875) L. R. 10 Q. B. 360.
(5) (1881) 18 Ch. D. 616, 622.
(6) (1899) 81 L. T. 811.
(7) 37 Ch. D. 490.

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easement. A vendor does not incur any obligation binding on his adjacent land merely by marking a proposed new road on a plan: see Romer L.J.'s judgment in *In re School Board for London and Foster*. (1) In all the cases where any right to use a road has been held to have passed, the words "bounded by" or "abutting on" an existing or intended road were present and formed part of the description. In *Espley* v. *Wilkes* (2) the words were "bounded on the east and north by newly-made streets"; in *Mellor* v. *Walmesley* (3) "bounded . . . . on or towards the west by the seashore," and it was held that the vendor could not build on a piece of his own land between the land sold and the seashore. In *Roberts* v. *Karr* (4) the words "abutting on a new road" were held to give a right of access to the road. In *Harding* v. *Wilson* (5) the words "abutting on a way thirty feet wide" in a lease were held not to give an underlessee a right to prevent the lessor narrowing the road.

Jenkins, K.C., in reply. The defendant is estopped from denying that the leases were executed on the dates placed on them with his consent. Norton on Deeds, p. 33, shews that when a deed is altered by agreement of all parties, the altered deed is the deed and can alone be looked at. *In re School Board for London and Foster* (6) was decided on the ground that the school board had no power to acquire easements. If Romer L.J.'s judgment, as reported in the *Law Times*, has the meaning my friend put upon it, it is obiter dictum and is too wide.

The case is covered by *Espley* v. *Wilkes*. (2) Farwell J. in *International Tea Stores Co.* v. *Hobbs* (7) said that the only question in these cases was whether the way had in fact been used. Here it has.

Cur. adv. vult.

1911. Nov. 17. NEVILLE J. The leases of the four houses in respect of which the plaintiff claims as mortgagee were executed in May, 1903, and were granted by the defendant Bowles to one

(1) (1903) 87 L. T. 700, 704.
(2) L. R. 7 Ex. 298.
(3) [1905] 2 Ch. 164.
(4) (1809) 1 Taunt. 495.
(5) (1823) 2 B. & C. 96.
(6) 87 L. T. 700.
(7) [1903] 2 Ch. 165.

Glock, who had erected the houses under the building agreement with Bowles. The leases bore date at the time of execution, 1903, the day and month being left in blank; and by arrangement between Bowles and Glock in July, 1904, the dates were inserted as of July 27, 28, 29, 30, 1904, the figure 3 in each lease being altered for that purpose. The leases were originally intended to operate, and did, I think, in fact operate (they were deposited as security for advances), from the date of execution. What was the effect of the subsequent alteration of the dates? Being assented to by the parties it does not, I think, avoid the deed. In *Hudson* v. *Revett* (1) Best C.J. says: "I beg not to be taken as deciding, that if a deed be altered with the consent of all the parties, after it is executed, it is not to be considered as a good deed. I think, if we were driven to examine that question, it would be found that, in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed it will, in its altered shape, be a good deed." Such an alteration could not, I think, operate to revest an estate which had already passed under the deed in its original form; but I see no reason why such an alteration should not avail to define the intention of the parties in the first instance in amplification of the grant; and I cannot but think that the lessor is estopped from shewing that the date inserted by himself in the lease is not the date from which the demise operated, so as to prevent any one claiming under the lease from relying upon the circumstances existing at the date which the lease bears. When the leases were originally executed the houses demised by them were nearly completed, but the fence at the back had not been erected. It must even then have been fairly obvious to any one inspecting the houses with the plan upon the leases before him, having regard to the laying out of the ground and the construction of the houses, that the back gardens were intended to open upon the four-foot strip of land indicated on the plan; while at the date which the leases bear the matter was made clearer, the back fences having then been erected, and the position of the gates defined. Under these circumstances, I think it would be a fraud upon an innocent purchaser, after he

(1) (1829) 5 Bing. 368, 388.

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had acquired his property, to block up his gates and refuse him access to the strip of land. Such action would, I think, stultify the intention to be inferred from the method in which the lessor laid out the land and the construction of the houses erected upon it. Except through the houses themselves, the only means of access to the gardens was along the strip, and I think some independent access to the gardens was necessary for the reasonable enjoyment of the houses as constructed. There was no accommodation for coal provided in the houses, and coal-sheds were erected behind. If there was no way along the strip, coal, manure, and garden refuse must have been carried through the houses themselves. In my opinion, reading the leases in the light of the surrounding circumstances, an intention to grant a right of way must necessarily be inferred. Although the path was never made up, except by the putting down of a little gravel by some of the tenants outside their gates, it was used by the occupiers of the houses until the happening of the events which led to the action. It is true that the lands behind the gardens, being waste land, and no boundary fence to the north of the four-foot strip having ever been erected, the tenants and the tradesmen passing from Enslin Road to the garden gates did not confine their user to the four-foot strip; but, inasmuch as there is no question here of the acquisition of a right by user, this seems to me quite immaterial. The property was personally inspected by the plaintiff on the occasion of his advance, and I find that he had no notice that there was any difficulty about the right of way. There was much discussion and some evidence upon the point as to what the strip of land four feet wide shewn upon the plan and coloured brown must be intended to indicate. I have no doubt, and I do not think any one capable of reading a plan at all would have any doubt, that it was intended to denote a way or passage, either made or intended to be made, along the northern boundary of the plots upon which the houses had been built.

I think one of the surrounding circumstances I am entitled to consider is the fact that under the building agreement the lessor was entitled to fix the character of the houses and the boundary walls; but if this be not so, I think the same result would follow

—that the lessor must be assumed to have known the condition of the property of which he granted the leases. Had the lessor power, however, to grant a right of way over the land in question? It seems to me impossible to imply a grant of a right of way over the land if the lessee under his building agreement was entitled to call for a lease of it. This depends upon the terms of the building agreement, viewed in the light of the subsequent dealings between the parties to it.

In my opinion when Glock accepted leases of the four houses, the boundary walls or fences of which he had erected under the terms of the agreement, he had exhausted his rights, and could not thereafter claim any further lease. I think, therefore, that the strip of land coloured brown remained the property of Bowles except so far as any right over it was granted by the leases.

In my opinion, therefore, an implied right of way along the strip of land four feet wide to the north of the plaintiff's houses to and from Enslin Road was granted by the leases. The plaintiff is entitled, I think, to the declaration and injunction he asks for, and the defendant must pay the costs of the action.

[His Lordship granted a stay of proceedings so far as the mandatory part of the injunction was concerned for fourteen days, and till the hearing of an appeal if brought within that time and duly prosecuted.]

Solicitors: *Macdonald & Stacey; Bannister, Ram & Fache.*

J. R. B.

EVE J.

1912

April 16, 17, 30.

In re BONACINA.

LE BRASSEUR *v.* BONACINA.

[1909 B. 2159.]

Debt — Bankruptcy of Debtor — Discharge — Statutory Release — Subsequent Acknowledgment of Debt — Foreign Document — Construction — Proceeding in respect of a Debt — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 30, *sub-s.* 3.

A debtor, who was an Italian subject trading in England, became bankrupt in 1897 and obtained his discharge in August, 1901. At the date of his bankruptcy he was indebted to a creditor, who was also an Italian subject, in a sum of 1350*l.*, but this was not disclosed in the bankruptcy proceedings. In October, 1906, a private writing in Italian form was signed by the debtor acknowledging his debt at a sum of 43,959 Italian lire, and undertaking to pay it off within five years from January 1, 1907, with interest. On the death of the debtor in March, 1908, the creditor first became aware of the previous bankruptcy proceedings. The estate of the debtor was being administered by the Court, and the creditor's claim for 1758*l.* 7*s.* 6*d.* and interest in respect of the debt was disallowed by the Master. Upon a summons to review the certificate:—

Held, that the document of October, 1906, gave rise to no cause of action according to English law, being a voluntary promise to pay for which there was no consideration.

Held, further, that, even assuming that judgment could be recovered in Italy upon the document, it could not be enforced in England since the claim was "a proceeding in respect of a debt" from which the debtor had obtained a statutory release by his discharge, and s. 30, sub-s. 3, of the Bankruptcy Act, 1883, applied.

Jones v. *Phelps* (1871) 20 W. R. 92, and *Heather & Son* v. *Webb* (1876) 2 C. P. D. 1, followed.

Adjourned Summons.

This was a summons by Giacomo Mina, of Monza, Italy, to vary a certificate made by a Master disallowing a debt sought to be proved against the estate of Lodovico Carlo Bonacina. The alleged debt arose under the following circumstances. L. C. Bonacina was an Italian subject carrying on business in London. On August 30, 1897, he was adjudicated bankrupt, and obtained his discharge on August 10, 1901. The name of the claimant Giacomo Mina, who was his brother-in-law, did not appear in the bankruptcy proceedings. There had been many monetary dealings of a friendly description between the

parties prior to the bankruptcy. At the date of the bankruptcy there was a debt of about 1350*l.* due for money lent or paid to Bonacina by Mina. On January 31, 1906, a letter was written by Mina to Bonacina pressing for a legal declaration of acknowledgment of his credit, and enclosing a statement of account made up shewing the amount of 43,959 lire to his credit to January 31, 1905. This account was discussed between the two parties in October, 1906, at Monza and accepted by Bonacina.

On October 15, 1906, an Italian document was signed by Bonacina, the material parts of which were as follows :—

"By the present private writing to be deemed to be a public instrument Commendatore Lodovico Bonacina . . . . (now residing in London, England) and Cavaliere Giacomo Mina . . . . residing at Monza (both Italians).

"1. Being desirous to arrive at, as they actually do arrive at, the settlement of their debts and credit accounts, have this day met, and having examined their entries wherefrom it appeared that C. L. Bonacina is indebted to C. G. Mina of Monza in the sum of lire forty-three thousand nine hundred and fifty-nine, we say L.43,959.

"2. C. L. Bonacina acknowledged his debt to C. G. Mina in the said sum of lire forty-three thousand nine hundred and fifty-nine, hereby declares and undertakes for himself, and for his heirs and successors, to pay to C. G. Mina, or to his heirs and successors, within a period of five years from the 1st of January, 1907, to the 31st of December, 1911, ... either in one single payment or in various instalments.

"3. Yearly interest shall accrue on the said principal sum of L.43,959 of lire four for every one hundred lire I say 4 per cent., and the said interest shall become payable from the 1st January, 1907, to the 31st December of each year, and until the agreed date for the reimbursement of the principal sum of L.43,959 which falls due on the 31st December, 1911 . . . .

"4. As regards the payment of the principal sum and interest thereon C. L. Bonacina, his heirs and successors, undertake to pay the same in legal currency and at the domicile of C. G. Mina at Monza, and to his heirs and successors.

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"5. The reimbursement of the eventual registration dues and income tax which might become chargeable on the aforesaid principal sum and interest thereon are hereby agreed to be chargeable to C. L. Bonacina, his heirs and successors.

"I acknowledge my debt in L.43,959.

"Monza, 15th Oct. 1906.

"(Signed) L. Bonacina."

Some payments were made to the claimant by Bonacina on account of this debt and in respect of interest. On March 31, 1908, Bonacina died, and the plaintiff in the action, Robert Le Brasseur, was the executor of his will. It was then for the first time that Mina heard of the previous bankruptcy proceedings.

The testator's estate was now being administered by the Court under an order dated October 25, 1909, and a certificate of debts was made by the Master on December 7, 1911, and filed on December 11. On December 14, 1911, the summons to vary was issued. Evidence was read as to the Italian law upon the construction of the Italian document and its enforceability in Italy.

Clayton, K.C., and *F. H. Maugham*, for the applicant. No doubt the order of discharge in England is an effectual release to the testator from the original debt, according to English law. But a new contract can be made if there is good consideration: *Heather & Son* v. *Webb.* (1) A new promise to pay revives the old debt. Here there is a new promise to pay, and a fresh debt created on the new contract in respect of the old debt is enforceable: *Jakeman* v. *Cook.* (2) But if not, this is an Italian contract made between Italian subjects, in Italian form, and to be construed according to Italian law: Dicey's Conflict of Laws, 2nd ed. pp. 529, 545; *Jacobs, Marcus & Co.* v. *Crédit Lyonnais.* (3) According to the evidence on Italian law it would be enforceable in Italy: *South African Breweries, Ld.* v. *King* (4); *Saxby* v. *Fulton.* (5) The lex loci contractus is therefore applicable. No consideration is required according to the law of Italy. The converse of the present case is that of *Antony Gibbs & Son* v. *La Société*

(1) 2 C. P. D. 1.
(2) (1878) 4 Ex. D. 26.
(3) (1884) 12 Q. B. D. 589.
(4) [1900] 1 Ch. 273.
(5) [1909] 2 K. B. 208.

Industrielle et Commerciale des Métaux. (1) [Reference was also made to the cases of *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (2) and *Hyams* v. *Stuart King.* (3)]

P. O. Lawrence, K.C., and *H. F. F. Greenland*, for the executor of the debtor. The document of October 15, 1906, was simply a written acknowledgment of the amount of an existing debt. The present claim is a proceeding in respect of a debt, and s. 30, sub-s. 3, of the Bankruptcy Act of 1883 is a complete answer to it. The debt is released by the discharge of the bankrupt. *Heather & Son* v. *Webb* (4) applies. There was no new promise, and no agreement to give time: *Kidson* v. *Turner.* (5) The case of *Jakeman* v. *Cook* (6) cannot be considered good law now, having regard to *Heather & Son* v. *Webb.* (4) There was no novation, no intention to make a new contract, and no clear agreement to substitute the new for the old debt, and in fact no contract at all by the creditor. It is merely a proceeding in respect of a debt which has been discharged. On the evidence of Italian law it is doubtful if this document could be enforced in Italy, and if not there is an end of the question. But we submit that no question of Italian law arises.

Clayton, K.C., in reply.

Cur. adv. vult.

April 30. EVE J. On August 30, 1897, the testator, an Italian subject long resident in England, was adjudicated a bankrupt, and on August 10, 1901, he obtained his discharge. At the commencement of the bankruptcy he was indebted to the present applicant, Giacomo Mina, of Monza, in the Kingdom of Italy, in an amount of 1350*l.*, or thereabouts, carrying interest originally at 5 per cent., but later on at 4 per cent.; but he never disclosed this indebtedness in the bankruptcy proceedings, nor did the creditor ever come to know of such proceedings until after the death of the testator, which occurred on March 31, 1908. In the meantime, that is to say in the years 1902 and 1904, the testator made payments to the creditor on account of the debt

(1) (1890) 25 Q. B. D. 399.
(2) [1898] A. C. 349.
(3) [1908] 2 K. B. 696.
(4) 2 C. P. D. 1.
(5) (1858) 3 H. & N. 581.
(6) 4 Ex. D. 26.

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amounting to 240*l.* or 250*l.*, and in October, 1906, signed, in Italy, a document to which I will refer by-and-by more particularly, whereby he acknowledged his then indebtedness, which represented the balance of the debt owing at the commencement of the bankruptcy and subsequent interest, at a sum of 43,959 Italian lire, equivalent to 1700*l.*, or thereabouts, and agreed to pay off the debt by instalments or otherwise within five years from January 1, 1907, and in the meantime to pay interest on the unpaid part at 4 per cent. per annum from the last-mentioned date. At or about the same time he paid to the creditor the interest on the debt for the year 1906. His estate is now being administered in this Court and Mina has brought in a claim as a creditor for 1758*l.* 7*s.* 6*d.* and interest. This claim has been disallowed, and the application with which I have now to deal is a summons by Mina to vary the certificate by allowing his claim as a debt provable against the testator's estate.

On behalf of the creditor, it is conceded that the order of discharge released the testator from the original debt, but it is contended that the transaction of October 15, 1906, was a new contract to pay and therefrom originated a cause of action arising after the discharge.

The executor, who resists the claim, argues that it is, in substance, a proceeding in respect of the debt from which the order of discharge released the testator, and that sub-s. 3 of s. 30 of the Bankruptcy Act, 1883, is a complete answer to it.

These contentions render it necessary, in the first place, to ascertain what was the nature of the transaction of October 15, 1906. In embarking upon this inquiry, it must be borne in mind that the creditor had no knowledge of the bankruptcy or the discharge, and that the debtor had never in any way treated the debt or his obligation to pay as affected thereby. The minds of the parties were not therefore directed to the consideration of any question how the debt might be revived; the circumstances and the correspondence which led up to what was done both shew that the sole object was to put on record a written acknowledgment of the subsisting debt.

Turning now to the document which was then signed, it is to be observed that it is not one which imposes any obligation on

the creditor; he does not even sign it. It commences with a statement in the nature of a recital that the account between the parties shews an indebtedness of 43,959 lire; the debtor then goes on to acknowledge the debt and undertakes to pay it within five years from January 1, 1907, either in one sum or by instalments, and a statement is added that yearly interest is to accrue on the unpaid principal at the rate of 4 per cent. The document concludes with the testator's signature, above which is this sentence written by him: "I acknowledge my debt in 43,959 lire."

According to English law, that document, in my opinion, gives rise to no cause of action; it is a voluntary promise to pay for which there is no consideration and which therefore could not be enforced. I do not accept the view that there is to be spelt out of its terms a contract by the creditor giving the debtor five years in which to pay the debt.

But it is said that these gentlemen, both Italians, entering into this arrangement in Italy, and incorporating in it a term that the debt was to be discharged in Italian currency at Monza, clearly intended their rights under this document to be determined according to the law of Italy, and, further, that, according to that law, the promise to pay would be enforceable by action notwithstanding the absence of consideration, and that to such action the discharge in the English bankruptcy could not be successfully set up by way of defence. I think these contentions, so far as they assert that the document is to be construed according to Italian law, are well founded, and, for the purposes of to-day, I will assume—though I do not think the applicant has fully established the fact—that the promise to pay embodied therein is one upon which judgment could be recovered in the Italian Courts, notwithstanding the discharge in the English bankruptcy.

But what then? Assuming that Mina had obtained judgment in Italy on this acknowledgment of October, 1906, and had sought to enforce payment under that judgment in this country against Bonacina or his estate, would it not have been open to Bonacina, and is it not now open to his executor, to resist the claim here, on the ground that the proceeding is, in substance, a proceeding in respect of a debt from which the debtor obtained

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a statutory release on his discharge? I think it is, and that the decision of the case turns on the question of fact whether the transaction of October, 1906, was a new engagement to pay an old debt from which the debtor had been then released, or a mere attempt to keep alive the old debt which both parties believed to be, and which according to Italian law it may well be was, still alive, but which, according to our law, had become barred by the bankruptcy. Upon this question of fact, it is clear that the parties were dealing throughout with the old debt which accrued before the bankruptcy proceedings, and, for these reasons, I think that any claim in this country under the document of October, 1906, must be, in substance, a proceeding in respect of that old debt, and therefore one to which the discharge is a complete answer. In so holding, I do not think I am doing, and I certainly do not intend to do, anything inconsistent with the decision in *Jakeman* v. *Cook*. (1) There the Court came to the conclusion on the facts that there was—to use the words of Baron Cleasby—"a real bona fide contract" to revive the old debt "for a valuable consideration arising after the discharge," and they held that the promise made and acted on after the discharge constituted the cause of action; but here, as I have pointed out, there never was from start to finish any notion of reviving an old debt or raising a new indebtedness, the sole intention and object of the parties being the putting on record of the amount of the old debt, and this state of facts brings the case within the principles underlying *Jones* v. *Phelps* (2) and *Heather & Son* v. *Webb*. (3) Accordingly I dismiss the summons with costs.

Solicitors: *White & Leonard; Le Brasseur & Oakley.*

(1) 4 Ex. D. 26, 31.
(2) 20 W. R. 92.
(3) 2 C. P. D. 1.

G. M.

In re WINDHAM'S SETTLED ESTATE.

WARRINGTON J.

1912

April 16.

[1911 W. 3305.]

Settled Land—Improvements—Rebuilding Mansion House—New Carriage Drive —"Annual rental of the settled land"—How to be ascertained—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 25, *sub-s.* (*viii.*)—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*iv.*).

The alteration, reconstruction, and enlargement of a mansion house where the original walls were retained but new wings were added to both the east and west ends of the old building:—

Held to be a rebuilding under s. 13, sub-s. (iv.), of the Settled Land Act, 1890.

The words "annual rental" in the proviso to sub-s. (iv.) must be read literally and means the total amount of the rents payable by the tenants to the landlord as appearing in the estate rent-book, subject to the modification that, if any part of the land is temporarily unlet, it must for the purpose of the sub-section be treated as producing the rent which an occupying tenant would usually pay for it. In estimating the amount, therefore, of the "annual rental" no deductions can be made for mortgage interest, tithes, land tax, drainage rates, or rent-charges. Property tax, however, may be deducted.

A new carriage drive rendered necessary by reason of the building of a new wing of the mansion house over the old carriage drive:—

Held to be a "private road" within s. 25, sub-s. (viii.), of the Settled Land Act, 1882.

Adjourned Summons.

Under a settlement constituted by the will of William George Windham, dated August 16, 1880, the Wawne estate, situate near Kingston-upon-Hull in the East Riding of the county of York, in the events which had happened, stood limited to the use of Major Ashe Windham for life, with remainder to the use of his son Ralph Windham, an infant, in tail, with remainders over.

The tenant for life entered into possession of the estate on February 2, 1903, which then consisted of a mansion house and about 3317 acres of land. The greater part of the estate had recently been sold for 84,000*l.*, leaving 124 acres with the mansion house thereon unsold.

Since January 1, 1903, the tenant for life had spent 14,381*l.* on the improvements of the estate, of which 9956*l.* 14*s.* 1*d.* was

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expended in respect of the mansion house and the farm known as the Home Farm, which had been retained unsold, and 4425*l.* 0*s.* 2*d.* in and about the erection of farm buildings and the improvement of farmhouses and buildings on the estate and in draining the lands sold.

The improvements were executed by the tenant for life without submitting a scheme either to the trustees or the Court.

The present summons was taken out by the tenant for life for an order that the trustees of the will for the purposes of the Settled Land Acts, 1882 to 1890, might be directed to apply the sums of 9956*l.* 14*s.* 1*d.* and 4425*l.* 0*s.* 2*d.* out of the capital money arising under the said Acts in their hands and subject to the will in payment of the above-mentioned works.

The nature of the various improvements made by the tenant for life together with the sums claimed by him in respect of them were detailed in an affidavit of Mr. T. H. Coatsworth, a land agent and surveyor.

The only matters in the case which call for a report are with reference to the questions whether the additions to and alterations in the mansion house constituted a "rebuilding" of it within sub-s. (iv.) of s. 13 of the Settled Land Act, 1890, and, if they did, how the "annual rental" referred to in the sub-section was to be ascertained, and whether the expense incurred in making a new carriage drive through the grounds could be allowed.

The facts relating to the rebuilding of the mansion house were thus stated by Mr. Coatsworth in paragraph 3 of his affidavit: "The mansion house of the estate known as 'Wawne Hall' was prior to 1900 in a very dilapidated condition. The house was very ancient and had not been used as a residence by Major Windham and his predecessors for over fifty years prior to 1903. The hall was little more than a farmhouse. It is low lying, built on a clay soil, and, at the time of Major Ashe Windham taking possession, was not fitted with a damp course, and, therefore, owing to the average water level in the soil being but some seven feet below the surface was exceedingly damp and unhealthy. In fact the whole of the wooden floors and joists of the ground floor rooms were absolutely rotten and had to be removed. It was necessary in order to make the house habitable that the earth

should be excavated beneath these floors and some six inches of concrete placed beneath the new floors. The hall contained only three living rooms with kitchens and offices on the ground floor and six bedrooms, boudoir and bath-room on the first floor and attics. The water supply was insufficient and the drainage bad; staircases were in a dangerous condition and in my opinion the hall was inadequate in size and entirely unsuitable as a mansion house for this estate. Major Windham has now added new wings to both the east and west ends of the old building and the hall now contains drawing-room, dining-room, billiard-room, study, entrance hall, two lobbies, conservatory and complete offices consisting of kitchen, servants' hall, coalhouse, housekeeper's room, men's room, larders, dairy and other conveniences on the ground floor, on the first floor a boudoir, eight main bedrooms, six smaller bed or dressing rooms and three w.c.'s and three bath-rooms fitted with hot and cold water, and on the attic floor, linen room and two large and one small bedrooms."

Mr. Coatsworth further stated in paragraph 5 of his affidavit that the cost of the rebuilding of the mansion house amounted at least to 5127*l.* 14*s.* 8*d.*

The gross income of the estate for the year ending May 1, 1911, was 4265*l.* The outgoings for that year were tithes, land tax, drainage rates, and a rent-charge amounting together to 869*l.* 0*s.* 9*d.*, and mortgage interest 1225*l.* gross, making a net income exclusive of property tax and cost of repairs of 2171*l.* 19*s.* 3*d.*

The new carriage drive was rendered necessary by the fact that the new west wing of the house extended over part of the old carriage drive, which was also at one point near the gate, owing to the presence of trees and the existence of an exceedingly sharp corner, dangerous to wheeled traffic. The tenant for life was therefore compelled to construct an entirely new drive, for which the cost of the materials only was claimed.

T. T. Method, for the tenant for life. The improvements and alterations made by the tenant for life in the mansion house were of so extensive a character as to amount to a "rebuilding" of it

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within s. 13, sub-s. (iv.), of the Settled Land Act, 1890 (1): *In re Walker's Settled Estate.* (2) In ascertaining the "annual rental of the settled land" referred to in sub-s. (iv.) no deductions ought to be allowed for mortgage interest, tithes, land tax, drainage rates, or rent-charges, but a deduction may be made for property tax.

The new carriage drive is a "private road" within s. 25, sub-s. (viii.), of the Settled Land Act, 1882, namely, a private road from the lodge to the mansion house.

Dighton Pollock, for the infant remainderman. The original mansion house remains, but new wings have been added to the east and west ends of it, and the question is whether there has been a rebuilding. It is not every rebuilding which would be a rebuilding authorized by s. 13. There must be really a substantial rebuilding, and not merely alterations and enlargements: *In re Walker's Settled Estate.* (3) Whether structural work is a rebuilding of a mansion house within s. 13, sub-s. (iv.), or merely an addition to or alteration in the house within s. 13, sub-s. (ii.), is a question of fact in each particular case: *In re Walker's Settled Estate* (3); *In re Kensington Settled Estates.* (4)

By "annual rental" in sub-s. (iv.) is meant, it is submitted, not the gross annual rental, but the annual rental after the necessary deductions have been made in order to ascertain the net income.

[WARRINGTON J. Does not "annual rental" mean the total amount of the rents paid by the tenants?]

That is not the rental obtained for beneficial purposes. "Annual rental," it is submitted, means the actual rental received by the tenant for life for spending purposes.

The new carriage drive was part of the scheme for laying out

(1) Settled Land Act, 1890, s. 13: "Improvements authorised by the Act of 1882 shall include the following; namely:

". . . . . .

"(iv.) The rebuilding of the principal mansion house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land."

(2) [1894] 1 Ch. 189.

(3) [1894] 1 Ch. 192.

(4) (1905) 21 Times L. R. 351.

the new garden, and the cost of making it ought not to be allowed.

W. R. Sheldon, for the trustees.

T. T. Methold in reply.

WARRINGTON J. This is an application by a tenant for life asking for repayment, out of capital moneys subject to the settlement, of large sums which have been expended by him upon the estate. A large portion of these sums, namely, that referred to in paragraph 11 of Mr. Coatsworth's affidavit, consists of money expended upon improvements to farm buildings, drainage, and so on, as to which I think there is no question, and the tenant for life is entitled to have those sums repaid to him out of the capital moneys.

The remaining part, however, of his application refers to moneys expended upon improvements to the mansion house and its surroundings, and with regard to these there is a difficulty. The total amount expended by him in reference to the mansion house amounts to 5127*l.* 14*s.* 8*d.*, and by s. 13, sub-s. (iv.), of the Settled Land Act, 1890, the rebuilding the principal mansion house on the settled land is included as one of the improvements authorized, but that is subject to this proviso: "that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land." In the first place, I have to consider whether the moneys said to have been expended in rebuilding the hall have been really so expended, or whether they have been expended merely in making alterations and additions to it. Now the hall, as it existed prior to the work done by the present tenant for life, and as it exists now, is described in paragraph 3 of Mr. Coatsworth's affidavit, and the conclusion to which I have come on reading that paragraph is that although the external walls of the old hall appear to remain standing and a great part of the work done by the present tenant for life consists merely of additions to that, yet so much has been done to the interior of the old hall in the way of reconstruction and rearrangement, that in substance I am able to say that the money expended has been expended in rebuilding the hall. Now the money so expended amounts, as I have said, to 5127*l.* 14*s.* 8*d.*,

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and under s. 13, sub-s. (iv.), of the Act of 1890 that sum cannot, therefore, be repaid to the tenant for life if it exceeds one-half of the annual rental of the settled land. That it undoubtedly does, because the gross annual rental of the settled land is 4265*l.*, and therefore it is quite clear that part only of the money so expended can be allowed. The question then arises what is the sum which, having regard to the proviso in sub-s. (iv.) of s. 13 of the Act of 1890, can be allowed out of this 5127*l.* 14*s.* 8*d.*, and that raises the question what is meant by the "annual rental of the settled land"? The facts in the present case are that the gross income of the estate is a sum of 4265*l.* The outgoings for the year ending May 1, 1911, to which the figures relate, because part of the estate has since been sold, were tithes, land tax, and drainage rates and a rent-charge, amounting together to the sum of 869*l.* 0*s.* 9*d.*, and mortgage interest 1225*l.* gross, making a net income, exclusive of property tax and cost of repairs, of 2171*l.* 19*s.* 3*d.* The question is whether the annual rental referred to in sub-s. (iv.) of s. 13 of the Act of 1890 is the 4265*l.* or whether it is the 2171*l.* 19*s.* 3*d.* In the first place the word is "rental." It is not "income," or "revenue," or any expression of that kind, which points to the personal enjoyment by any person, and in accordance with that view it has already been decided in *In re Kensington Settled Estates* (1) that the cost of repairs is not to be deducted in ascertaining what is the "annual rental." On the other hand, I am of opinion that property tax may be deducted, because that is retained by the tenant before he pays his rent. It seems to me that the only principle on which one can proceed in interpreting this sub-section is to read the word "rental" literally as it stands, and I think "rental" means the total amount of the rents payable by the several tenants to the landlord or his agent, that is to say, the total amount appearing in the rent-book which I suppose most landowners would keep, shewing the rents paid by their several tenants. In this particular case that amount will be the 4265*l.* It seems to me that when the sub-section speaks of "annual rental"—not gross rental or net rental, but simply "annual rental"—it means the sum of the rents paid by the several tenants with, of

(1) 21 Times L. R. 351.

course, this modification, that if any part of the land is temporarily vacant then one is entitled, for the purpose of applying the sub-section, to treat it as producing the rent which a tenant occupying it usually pays. I think, therefore, the mortgage interest, at all events, ought not to be deducted before ascertaining the rental. I also think that there ought to be no deductions for tithes, land tax, drainage rates, or the rent-charge. The tenant for life will therefore be allowed one-half of the 4265*l.*, that is, 2132*l.* 10*s.*, in respect of the rebuilding of the mansion house. [His Lordship then dealt with other items of expenditure, and continued:] Then with regard to the roads, the tenant for life has spent a considerable sum of money on making a new carriage drive and a new footpath which runs round the new gardens. With regard to the new carriage drive, it seems to me that that does come under the head of "private roads" in s. 25, sub-s. (viii.), of the Act of 1882. It is a road and it is private. The mere fact that it leads from the lodge entrance through the garden to the hall does not make it any the less a road. But with regard to the footpath and what one may call the ordinary paths mad in laying out a garden, I do not think they can, under any interpretation, come under the heading of "private roads." I think, therefore, I must allow the expense of making the carriage drive, but not the footpaths. I accordingly authorize the trustees to expend a sum of 100*l.* under this head. [His Lordship then dealt with the remaining items of expenditure.]

Solicitors for all parties: *Rawle, Johnstone & Co., for E. J. Wilson & Sons, Hull.*

W. I. C.

WARRINGTON J.

1912

April 20.

BRITISH, FOREIGN AND COLONIAL AUTOMATIC LIGHT CONTROLLING COMPANY, LIMITED *v.* METROPOLITAN GAS METERS, LIMITED.

[1911 B. 1267.]

Patent—Practice—Costs—Taxation—Action for Infringement of Three Patents —Abandonment of Two of Patents at Trial—Costs of Particulars of Objections to Abandoned Patents — Rules of the Supreme Court, 1883, *Order* LIII.A, *r.* 22.

An action was brought by the plaintiffs for the infringement of three patents. At the trial the plaintiffs elected not to proceed with the action so far as it related to two of the patents. The action was tried on the third patent and was dismissed with costs :—

Held, that the action did not "proceed to trial" on the two abandoned patents within the meaning of r. 22 of Order LIII.A, and that the costs of the defendants' particulars of objections to those patents were in the discretion of the taxing Master.

Babcock & Wilcox, Ld. v. *Water Tube Boiler and Engineering Co.* (1910) 27 Rep. Pat. Cas. 626, followed.

May v. *Yuill & Co.* (1910) 27 Rep. Pat. Cas. 525, not followed.

The action was brought by the plaintiffs against the defendants for an injunction to restrain the infringement of three of their patents. At the trial the plaintiffs elected not to proceed with their action so far as it related to two of the patents. The action was tried on the third patent only and was dismissed with costs. (1)

On the matter coming before the taxing Master for taxation of costs, the taxing Master took the view that the action had proceeded to trial on all the three patents, and, therefore, that under Order LIII.A, r. 22 (2), it was not in his discretion to allow any

(1) (1911) 29 Rep. Pat. Cas. 209.

(2) Order LIII.A, r. 22 : "On taxation of costs in any action . . . . for infringement of patent . . . . the following provision shall apply, that is to say :—

"If the action . . . . proceeds to trial on any patent, no costs shall be allowed in respect of any issues raised in the . . . . particulars of objections, and relating to that patent to the parties delivering the same respectively except in so far as such particulars are certified by the Court to have been proven or to have been reasonable and proper without regard to the general costs of the case but subject as aforesaid the costs of the issues raised by . . . . the particulars of objections shall be in the discretion of the taxing Master."

costs in respect of the issues raised in the particulars of objections to the two abandoned patents, inasmuch as the particulars of objections had not been certified by the Court to have been proven or to have been reasonable and proper, and he proposed to tax the costs on that footing.

By arrangement between the parties, instead of waiting for the completion of the taxation, and the dissatisfied party then taking out a summons to review the taxation, the matter was now mentioned to the Court.

J. Hunter Gray, for the defendants. Order LIII.A, r. 22, provides for the present case and makes the matter perfectly clear. Before this rule was made, unless the Court could certify, by having seen the particulars of objections, that they were reasonable and proper, no costs could be given, and the result was that whenever an action was discontinued before trial the defendant did not get any costs of his particulars. The present rule was made to remedy that hardship, and the last part of it provides for the case where the action does not proceed to trial. This action did proceed to trial on one patent but not on the other two.

[WARRINGTON J. No issues were tried on those two patents?]

None whatever. If it had been only half an hour before the case came on and the plaintiffs' counsel had said to the defendants that they were not going on with the action as regarded those two patents, it is quite clear that the action would not have proceeded to trial on them. The fact that it was at the opening of the case that the defendants decided not to go on can make no difference. The point was really decided in *Babcock & Wilcox, Ld.* v. *Water Tube Boiler and Engineering Co.* (1), and also, as appears from the shorthand notes of the proceedings, at the trial of the present action.

J. Goodland, for the plaintiffs. In *May* v. *Yuill & Co.* (2), which was a case similar to the present, the defendants appeared at the trial but the plaintiff did not appear, and judgment was given for the defendants with costs. Phillimore J. there held that the action had proceeded to trial, but refused to certify the particulars of objection on the ground that he did not know whether

(1) 27 Rep. Pat. Cas. 626. (2) 27 Rep. Pat. Cas. 525.

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they were good or bad. In *Babcock & Wilcox, Ld.* v. *Water Tube Boiler and Engineering Co.* (1) your Lordship said: "The consolidated actions come on for trial, but do not proceed to trial, because as soon as the actions are called on, the plaintiffs state that they submit to judgment for the defendants with costs."

[WARRINGTON J. I am prepared to say the same thing here.]

There is this difference, that whereas in that case the action did not proceed to trial at all, in the present case it proceeded to trial on one patent and not on the other two.

The present issue is one which has been raised by the taxing Master on the taxation on which he desires the decision of the Court, and it is submitted that no costs of this application should be given to either side.

J. Hunter Gray. I do not press for costs.

WARRINGTON J. The question in this case is as to the true construction of Order LIII.A, r. 22, in reference to particulars of objections. The action was brought for an injunction to restrain the infringement of three patents. At the trial the plaintiffs intimated, on the case being opened, that they did not propose to insist upon two of their patents. The action was thereupon tried in reference to the third patent, and the third patent only. After judgment had been delivered dismissing the action with costs, the usual discussion took place with regard to the particulars of objections, and, according to the shorthand notes of the proceedings, Mr. Walter, who appeared for the defendants, said, "The action is brought on three patents, but your Lordship remembers the view of the rule which was taken by your Lordship and Mr. Justice Parker. It is provided for in Order LIII.A, r. 22." In answer to that I said, "Yes; I allow the costs of the particulars of objections." Then Mr. Walter said: "They come before the taxing Master, and he has a discretion." I said "Yes." Then with regard to the patent in respect of which the action had been tried out, I was asked to allow certain particulars of objections and I did so. The matter has now come before the taxing Master, and the taxing Master has taken the view that the action proceeded to trial on all the patents, and that it is not in his

(1) 27 Rep. Pat. Cas. 626, 628.

discretion to allow the particulars of objections in respect of those patents on which the action was not proceeded with, and he proposes to tax on that footing. The matter, by arrangement between the parties, has been mentioned to me, instead of waiting until the completion of the taxation, and then issuing a summons for review. This I think is a convenient course, and I propose now to deal with the matter.

The rule is this: [His Lordship read r. 22 shortly, and continued:] The first remark to be made on that rule is that the rule clearly contemplates that an action may proceed to trial on one patent and not on others; that is to say, the action may relate to several patents, and may proceed to trial on one patent, and not on the others, and it provides that, if it proceeds to trial on any patent, then there must be a certificate, but that in all other cases, that is to say, as regards those patents in respect of which the action does not proceed to trial, the costs of the particulars of objections are to be in the discretion of the taxing Master. The reason of this is of course obvious, and it is this: that unless the trial is actually proceeded with, the judge has no means of determining whether the particulars of objections are reasonable or not, and accordingly the rule in that case leaves it to the taxing Master to look into them, and to say whether or not they are reasonable and proper, and whether the costs of them ought to be allowed.

The question then is: Did this action, within the meaning of the rule, proceed to trial on these two patents? In my opinion it did not. The substance of the case is this so far as those two patents are concerned. On the case being called on for trial the plaintiffs discontinued the action so far as it related to those two patents. The case is exactly the same as if the day before, or half a day before, the day on which the action was to come on for trial the plaintiffs had written a letter to the defendants saying that they abandoned their action. It seems to me that as regards those two patents the action did not proceed to trial and therefore that the costs of the particulars of objections to them are in the discretion of the taxing Master. In saying what I have now said it seems to me that I am saying exactly what I said after the trial. The point was in the minds of all of us when

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the discussion to which I have already referred took place, and it is also in accordance with what I said in *Babcock & Wilcox, Ld.* v. *Water Tube Boiler and Engineering Co.* (1) It is true that in *May* v. *Yuill & Co.* (2) Phillimore J. said that in the particular case before him he thought that the action had proceeded to trial; but it is to be noticed in that case that the plaintiff did not appear at all, and that the matter was really only partially discussed. I think it is right, therefore, to repeat the opinion I expressed in *Babcock & Wilcox, Ld.* v. *Water Tube Boiler and Engineering Co.* (1) and which I really expressed at the trial of the present action. The taxing Master will act on what I have said. There will be no order drawn up; and there will be no costs of this application.

Solicitors: *Faithfull & Owen; Radford & Frankland.*

W. I. C.

In re FRY.

FRY *v.* FRY.

JOYCE J.

1912

May 8.

[1912 F. 228]

Will—Devise of Mortgaged Property—Trust for Sale reserving Rent-charges—Payment of Mortgage Debt—Deficiency—Liability of Residuary Estate—Marshalling—Real Estate Charges Act, 1854 (17 & 18 *Vict. c.* 113), *s.* 1.

A testator devised property, which was subject to mortgages at the date of his will and death, on trust for sale, rent-charges of specified amounts to be created and reserved thereout for the benefit of daughters and their families. The property was insufficient for creation of the rent-charges and payment of the mortgage debts. There was no "contrary or other intention" signified by the testator within the meaning of Locke King's Act:—

Held, on the principle of marshalling, that the rent-chargees were entitled to have the property sold, reserving the rent-charges, any deficiency of the proceeds for satisfaction of the mortgage debts to be made good out of the general personal estate.

Buckley v. *Buckley* (1887) 19 L. R. Ir. 544, followed and applied.

ADJOURNED SUMMONS.

John Fry by his will, dated April 5, 1906, after appointing

(1) 27 Rep. Pat. Cas. 626. (2) 27 Rep. Pat. Cas. 525, 526.

the plaintiffs executors and trustees and making certain bequests and devises (not material to the present purpose), devised ten houses in Fry's Parade and ten houses in Hopetown Road to his trustees on trust that they should, after giving six months' notice to the mortgagees (if the hereditaments should be in mortgage at his death), sell the same by public auction or private contract, at the same time creating and reserving out of each of the houses rent-charges amounting in the aggregate to 26*l.* 10*s.* on the Fry's Parade houses and 25*l.* 10*s.* on the Hopetown Road houses, and he directed his trustees to stand possessed of the rent-charges issuing out of the Fry's Parade hereditaments upon trust for his daughter Edith for life and after her decease for her children, and if the daughter should die without leaving issue obtaining a vested interest the rent-charges should form part of his residuary estate. And as to the rent-charges issuing out of the Hopetown Road hereditaments he gave similar directions in favour of his daughter Ellen and her children with a similar gift over to the residuary estate.

He devised another house to his trustees upon trust for sale and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, any balance to form part of his residuary estate.

He devised and bequeathed all the residue of his real and personal estate to his trustees upon trust for all his children.

The testator died on October 10, 1911, and his will was duly proved.

The houses in Fry's Parade and Hopetown Road were at the date of the will and the testator's death subject to mortgages amounting together to 2000*l.*

The plaintiffs had given notice to pay off the mortgages, but were advised that the values of the houses were insufficient to enable the rent-charges to be created and also the mortgages to be satisfied. It was estimated that the residuary estate (after paying simple contract debts and expenses) would be sufficient to meet the deficiency.

Questions having arisen whether the deficiency should be

JOYCE J. 1912 FRY, *In re.* FRY *v.* FRY.

paid out of the residuary estate or whether the rent-chargees should be charged with it, the plaintiffs took out this summons for (inter alia) the determination of the question whether the rent-chargees were entitled to their rent-charges free from, and without any liability to contribute to payment of, the mortgage debts.

E. Ford, for the plaintiffs.

C. Hartree, for the rent-chargees. In view of the provision of Locke King's Act that mortgages are to be paid out of the mortgaged property unless the testator has signified a "contrary or other intention," it is difficult to contend that the rent-chargees here must not bear the deficiency.

M. Gilbart-Smith, for the residuary legatees. There is no "contrary or other intention" to take the case out of Locke King's Act, and the rent-chargees, so far as necessary, must bear the burden of the mortgages. But it is right to tell the Court that a case decided in Ireland of *Buckley* v. *Buckley* (1) seems to be against the residuary legatees. The answer, however, to that is that the decision is contrary to the words of the Act.

[*Hartree* mentioned that it was cited in Jarman on Wills, 6th ed. p. 2050, as an authority for the proposition that a direction to pay "debts of every kind, including specialty debts," was not an indication of a "contrary or other intention" so as to exclude the operation of Locke King's Act.

E. Ford pointed out a reference to it in Theobald on Wills, 7th ed. p. 179, to the same effect.]

In *Buckley* v. *Buckley* (1) annuitants whose annuities were charged on mortgaged land which was primarily liable for the mortgages, as the rent-charges here are charged, were held to be entitled to have the assets marshalled in their favour so as to have any deficiency of their annuities made good out of the personal estate.

[JOYCE J. *Buckley* v. *Buckley* (1) is very like this case when one comes to look at it.]

Yes. It is cited in Carson's Real Property Statutes, 2nd ed. pp. 437, 438, and in all the text-books.

(1) 19 L. R. Ir. 544.

[JOYCE J. Why should I not follow it?]

The Irish Master of the Rolls said that an annuitant or a rent-chargee was not a devisee, but in that he was wrong and his decision need not be followed. The rent-chargees are devisees of part of the land, and they cannot throw the mortgage debt on the personal estate by marshalling. If *Buckley* v. *Buckley* (1) is right, it places a devisee of part of the land in a better position than a devisee of the whole.

[JOYCE J. It seems to be the only authority on this point under the Act.]

The matter has been recently dealt with in *In re Smith* (2), which is a converse case, and not inconsistent with *Buckley* v. *Buckley*. (1) *In re Smith* (2) was a case where a "contrary intention" was signified and which was therefore outside Locke King's Act, and in such cases the old law as to marshalling remains untouched. If *Buckley* v. *Buckley* (1) is right, the Act ought to have contained a proviso that, the Act notwithstanding, no one is to be precluded from setting up his right to marshal.

[JOYCE J. It does not seem to have been ever suggested before that *Buckley* v. *Buckley* (1) was wrong.]

The present case is a new one in England. Marshalling has never been applied in favour of a rent-chargee before. It is too late to apply it now. The doctrine of marshalling as it has been developed already presents anomalies: Theobald on Wills, 7th ed. p. 857; and it ought not to be extended. There is no reason why a devisee of a rent-charge whose fund is exhausted should diminish the fund of the residuary legatees. The Act distinctly says that a devisee is not entitled to have the mortgage debt discharged out of the general estate, yet it is here asked that he shall be. The residuary legatees are entitled to have the mortgage debts paid out of the proper security in the proper order and without any reference to the doctrine of marshalling.

JOYCE J. Upon consideration and after hearing what Mr. Gilbart-Smith has said, I have come to the conclusion that the present case is the same as *Buckley* v. *Buckley* (1), and I do not

(1) 19 L. R. Ir. 544. (2) [1899] 1 Ch. 365.

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1912
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see how to distinguish it. Though at first one may have been a little startled by that case, it appears to be cited in all the text-books, and with approval. Certainly, in my opinion, it is an authority which enables the Court to do justice in the present case, and prevents something which might come near to being a catastrophe. And upon the whole I see no reason why I should dissent from it. Much is to be said for it. I propose, therefore, to follow it. The result will be that the mortgaged lands will be sold reserving the rent-charges, and if that does not leave sufficient for payment of the mortgages the deficiency, after exhausting the proceeds, will be paid out of the residuary estate, and if the residuary estate is not sufficient then the balance will have to be raised by mortgage of the rent-charges.

Solicitors: *Ford & Ford, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

A. L.

SWINFEN EADY J.
1912
April 25, 26.

In re DANIELS.

WEEKS *v.* DANIELS.

[1907 D. 1317.]

Settled Land—Power to lease Lands—Unopened Mines—Will—Construction—Proportion of Rents to be set aside as Capital—Contrary Intention—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 11.

A power to lease "lands" does not enable the donee to lease unopened mines. A lease of unopened mines by trustees of a will and cestuis que trust which is not within a power in the will, and which could not be validly made out of the estates of the cestuis que trust, but which could be made under the Settled Land Acts, will be treated as made under those Acts, and three fourths of the rent and royalties must be set aside as capital. A direction in a will to pay the rents of unopened mines to a tenant for life is not an expression of a "contrary intention" within the meaning of s. 11 of the Settled Land Act, 1882.

JAMES DANIELS by his will, dated March 31, 1875, appointed his sons James Daniels, Charles Daniels, and William Kelson Daniels trustees and executors, and gave certain specifically described messuages and parcels of land to his said trustees "(except and reserved thereout all the timber and timber-like

trees in the said hereditaments and premises and all mines of coal and other minerals thereunder) upon trust that they or the survivors or survivor of them or the heirs executors or administrators of such survivor or other the trustees or trustee for the time being of this my will (hereinafter called my said trustees or trustee) do and shall pay the rents and annual income of the said hereditaments and premises unto or permit the same to be received by my said son James Daniels for his life or until he shall become bankrupt or compound with his creditors or do any act by means whereof the said rents and annual income would but for this condition become vested in or payable to any other person and after his death or bankruptcy or any such composition or act as aforesaid to pay the said rents and annual income to or permit the same to be received by Sarah Daniels the wife of the said James Daniels for her life or until she shall marry again or become bankrupt or compound with her creditors or do any act whereby the said rents and annual income shall become payable to any other person and after the determination of the foregoing trusts for the benefit of my said son James Daniels and his said wife my said trustees or trustee shall stand seised and possessed of the said hereditaments and premises Upon trust for the child or children of the said James Daniels and his her or their respective heirs executors administrators and assigns and if more than one in equal shares as tenants in common."

The testator gave five other sets of specifically described messuages and pieces of land to his trustees with a like exception of timber and mines and minerals upon similar trusts in favour of his three other sons Charles Daniels, William Kelson Daniels, and John Kelson Daniels and his daughters Helen Joyce Gullick and Emma Weeks and their respective wives, husbands, and children to those declared in favour of James Daniels, his wife and children. The trusts were not declared by reference, but fully repeated in each case. The testator gave all the residue of his real and personal estate over which he had power of disposition by will (including all the timber and timber-like trees and mines of coal and other minerals reserved out of the thereinbefore mentioned devises)

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unto his trustees "Upon the trusts following (that is to say) as to one sixth part thereof upon the same or the like trusts in favour of my said son James Daniels and his wife and children as are hereinbefore declared with respect to the said hereditaments and premises hereinbefore devised and bequeathed upon trust for them." Then followed five gifts of the other five sixths upon the like trusts in favour of his other three sons and two daughters as were declared of the hereditaments thereinbefore given in trust for them and their respective wives, husbands, and children, and the will proceeded as follows :—

"I declare that in case either of my said sons and daughters shall die without leaving a child or children who shall live to attain the age of twenty-one years or shall die under that age leaving issue the share of my said son or daughter so dying shall be held by my said trustees or trustee Upon trust for my grandchild or grandchildren (child or children of my other sons and daughters) who shall be living at the death of any such son or daughter so dying and his her or their respective heirs executors administrators and assigns and if more than one such grandchild in equal shares as tenants in common."

The only leasing power in the will was in the following terms :— "Provided always and I do hereby authorise my said trustees or trustee to let all or any part of the lands for the time being subject to the trusts of this my will from year to year or for such term or terms of years at such rent or rents under such conditions and in such manner as my said trustees or trustee shall think proper."

The testator died on March 21, 1877, and his will was duly proved on April 12, 1877, by the said James Daniels and William Kelson Daniels, the said Charles Daniels having died in the testator's lifetime.

At the date of the lease hereinafter mentioned three of the testator's sons and his two daughters had died leaving children. James Daniels (the son) and his wife Sarah Daniels were living, but had never had any children and were both over seventy years of age. The widow of William Kelson Daniels and the husbands of the testator's two daughters were also living. Walter Kelson Daniels, the son of the testator's son William Kelson Daniels, had been appointed trustee of the testator's will in his place.

By an indenture of lease dated December 5, 1902, and expressed to be made between the trustees of the testator's will of the first part, the said James Daniels and Sarah Daniels his wife of the second part, the persons beneficially entitled to the other five equal sixth shares in the residue being the children, and in one case some of the grandchildren, of the testator's children, the widows of two of his sons, and the surviving husbands of his two daughters of the third, fourth, fifth, sixth, and seventh parts (which parties of the first seven parts were collectively referred to as the lessors), the husband of one of the testator's grandchildren of the eighth part, and two gentlemen referred to as the lessees of the ninth part, the mines of coal and other minerals under the six sets of lands specifically devised by the said will, and other minerals which belonged to the testator's estate, were expressed to be demised by the lessors to the lessees for a term of sixty years from December 31, 1899, at the rents and royalties thereby reserved. The will of the testator was recited, including the power to let lands, but the lease was expressed to be made not by the trustees in exercise of their power, but by all the lessors, which term was defined to mean "the parties hereto of the first part and their successors and assigns as trustees of the will of the said James Daniels deceased and the parties hereto of the second third fourth fifth sixth and seventh parts and where the context admits their heirs executors administrators and assigns." The lessors were expressed to demise "as to such of them as are trustees as trustees and as to such of them as are beneficial owners as beneficial owners," and the rent was reserved to, and the lessees' covenants entered into with, the lessors. None of the demised mines were open mines at the testator's death.

Morley Simmonds, one of the testator's great grandchildren, who was made a party to the lease as heir-at-law of a deceased granddaughter entitled to a share in one of the sixth shares, was an infant at the date of the lease and had since died in infancy. His next brother thereupon became his mother's heir-at-law, and he attained twenty-one, but never confirmed the lease. In 1907 an action was commenced by some of the beneficiaries against the trustees for the administration of

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the trusts of the testator's will, charging the trustees with breach of trust and asking for their removal. By orders made in this action new trustees had been appointed of the testator's will, the old trustees retiring, and the usual administration decree had been made.

This summons was taken out in the action by the new trustees for the determination, among other questions, what part of the rents payable in respect of the one sixth share by the said will given to James Daniels, the son, ought to be set aside as capital. Up to the date of this summons the lessees had divided the rents and royalties into six parts and paid the tenants for life the whole of these shares without setting apart any proportion as capital.

The said James Daniels, the son, was adjudicated bankrupt on November 28, 1911, and thereupon the income of the one sixth share payable to him became payable to his wife, Sarah Daniels, and the summons was amended accordingly.

Crossman, for the trustees.

Noad, for the trustee in bankruptcy of James Daniels the son. The lease was granted under the power in the will. Where there are several powers of leasing a man will be deemed to have exercised the power which is first in date, or which is most advantageous to himself: *Earl of Lonsdale* v. *Lowther*. (1) The power in the will in this case is both the first in date and the most advantageous. Where a power to lease directed that the tenant for life should be impeachable for waste the words were struck out as repugnant: *Daly* v. *Beckett*. (2) Even if the lease is taken to be granted under the Settled Land Act, 1882, the direction to pay the rents to the tenant for life is proof of a "contrary intention" within the meaning of s. 11: *In re Duke of Newcastle's Estates* (3); *In re Bagot's Settlement*. (4) The form of gift in this case gives the tenant for life the whole of the rents: *Dashwood* v. *Magniac* (5); *Earl Cowley* v. *Wellesley*. (6) In *In re Nicholson* (7) it was held that such a gift carried the

(1) [1900] 2 Ch. 687.
(2) (1857) 24 Beav. 114.
(3) (1883) 24 Ch. D. 129, 143.
(4) [1894] 1 Ch. 177, 184.
(5) [1891] 3 Ch. 306.
(6) (1866) 35 Beav. 635; L. R. 1 Eq. 656.
(7) [1909] 2 Ch. 111.

income of unauthorized securities, and by the same reasoning it would carry the rents of mines. In any case the tenant for life is not impeachable for waste, and therefore only one fourth must be set aside.

The trustee in bankruptcy is entitled to his costs though James Daniels was indebted to the estate: *Bowyer* v. *Griffin*. (1)

Northcote, for Sarah Daniels, adopted the same argument, but added: It is plain that no one intended to exercise the power given by the Settled Land Acts, for the rent is reserved to all the lessors. Under the Settled Land Acts it is properly reserved to the tenant for life: Key and Elphinstone's Conveyancing, 9th ed. vol. i. p. 959, n.; Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 351, note to s. 11; it may sometimes be reserved to the trustees, but never to remaindermen. There is a special devise of the mines with a direction to pay the rents. The testator intended they should produce some rents and he had only unopened mines. The power therefore extends to unopened mines. The only question is whether a power to let lands includes mines, and *In re Barker* (2) is an authority that it does.

Tomlin, for persons entitled in remainder. There are only three ways in which the lease could possibly be valid—(1.) if good under the power; (2.) if made by all persons interested; (3.) under the Settled Land Acts. It cannot be good under (2.), for Morley Simmonds, who was joined as heir-at-law of one of the testator's daughters, was an infant and died under twenty-one; his next brother thereupon became the heir, and he has attained twenty-one, but he never confirmed the lease. The grandchildren who are entitled to this particular sixth share after the deaths of James Daniels and his wife are a class which cannot yet be ascertained.

As to (1.), it is settled law that a power to lease lands does not enable the donee to lease unopened mines: Farwell on Powers, 2nd ed. p. 602: *Clegg* v. *Rowland* (3); *In re Baskerville*. (4) In *In re Barker* (2) the power was to lease any part of the testatrix's real estate. A lease purporting to be made by an absolute owner will be treated as made in exercise of the

(1) (1869) L. R. 9 Eq. 340.
(2) (1903) 88 L. T. 685.
(3) (1866) L. R. 2 Eq. 160, 165.
(4) [1910] 2 Ch. 329.

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powers of the Settled Land Acts in order to carry out the intention of the parties: *Mogridge* v. *Clapp.* (1) If the lease could operate out of the estates of the persons granting it the tenants for life could not grant leases of unopened mines.

The only remaining point is whether there is anything in the will to shew a contrary intention within the meaning of s. 11. There is nothing but the direction to pay rents to the tenants for life, and that is not enough. *In re Ridge* (2) shews that a person entitled to rents and profits is not entitled to royalties from minerals.

J. Henderson, for persons in the same interest.

Northcote in reply.

SWINFEN EADY J. The question raised by this summons is how the rents derived from a lease of coal and other mines and minerals ought to be dealt with. In order to decide that question it is necessary to consider whether the lease is within the power of leasing contained in the will of James Daniels, or must be deemed to have been made under the Settled Land Act, 1882, and in the latter alternative whether the will shews a contrary intention within the meaning of s. 11 of that Act.

The will contains six specific devises to trustees of lands "except and reserved thereout all the timber and timber-like trees on the said hereditaments and premises and all mines of coal and other minerals thereunder" upon trust to pay the rents as therein mentioned, and then there is a devise of residuary real estate to the trustees, which includes the minerals under the specifically devised lands, upon trust in sixths for the same persons as those for whom the specifically devised hereditaments were held in trust. Under this trust the testator's son James Daniels and his wife are entitled to the rents and profits of one sixth of the minerals by reference to the trusts of the lands specifically devised in trust for them. Then follows this power: "I do hereby authorise my said trustees or trustee to let all or any part of the lands for the time being subject to the trusts of this my will from year to year or for such term or terms of years at such rent or rents under such conditions and in such manner as my

(1) [1892] 3 Ch. 382, 394. (2) (1885) 31 Ch. D. 504, 508.

said trustees or trustee shall think proper." It is to be observed in the present case that the testator had no open mines, and the words of the power do not in terms refer to mines and minerals, and there are no general words containing any reference to demising coal upon royalty. The power is simply to let lands for any term of years. Under such a power have the trustees power to grant mining leases? In my opinion they have not. In Farwell on Powers, 2nd ed. p. 602, the law is thus stated—I need only read the opening words: "A power to lease lands, without mentioning mines, authorizes a lease of open but not of unopened mines." The recent case of *In re Baskerville* (1) shews that that statement of the law has been and is adopted by the Courts. Under these circumstances it appears to me that the power in the will does not authorize the trustees to grant mining leases. The other cases which have been referred to, such as *In re Barker* (2), turned upon the particular words in the several wills. But I do not think it necessary to go through and distinguish them. I shall follow *In re Baskerville* (1) and decide that the power in the will does not authorize a lease of unopened mines. But it was argued that even if there is no power in the will to grant this lease, and it must take effect under the Settled Land Act, still s. 11 of the Settled Land Act, which directs part of the rent to be set aside as capital, is expressed to operate only "unless a contrary intention is expressed in the settlement," and in this will the direction to pay the rents and profits to the tenant for life is sufficient indication of a contrary intention. In my opinion it is not sufficient. In all, or nearly all, the cases upon which reliance was placed for this proposition, the will or settlement contained a power to lease under which it was said that the tenant for life was intended to take all the rents, or there was some other indication of such an intention. In this case I have nothing but the words "pay the rents and profits." That is not sufficient.

As therefore the lease is not within the power in the will, and cannot take effect as granted out of the interests of the lessors, the only way in which it can be effective is under the Settled Land Acts, and as the will shews no contrary intention, and

(1) [1910] 2 Ch. 329. (2) 88 L. T. 685.

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the tenants for life are impeachable for waste, three fourths of the rents must be set aside as capital moneys. The best plan will be for the lessees to pay one fourth of the one sixth in question to the tenant for life and three fourths to the trustees.

Solicitors: *Seymour Williams & Co., for Lawrence & Co., Bristol; Guscotte, Wadham & Co., for W. E. Lawrence & Harvey, Bristol; Robins, Hay, Waters & Hay, for Mann, Rodway & Green, Trowbridge; Rossiter & Odell.*

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In re PORTER, AMPHLETT & JONES.

Solicitor—Costs—Local Authority—Taxation between Solicitor and Client—Common Order—Disbursements—Items incurred on Special Instructions—Usual Charges—No Question of Quantum—Propriety of Expenditure qua Ratepayers—Province of Taxing Master—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 247, 249.

In taxing a bill between solicitor and client under the Solicitors Act, 1843, s. 37, the taxing Master must allow disbursements for items incurred on the client's special instructions, and for which the usual charges are made, even though that client is a local authority.

The question whether the items are expenses that ought to be allowed as between the local authority and the ratepayers does not arise on such a taxation, but is a matter for the auditor under the Public Health Act, 1875, ss. 247, 249.

Southampton Guardians v. *Bell* (1888) 21 Q. B. D. 297, 300, applied.

In re Frank James & Sons [1903] W. N. 99, distinguished.

SUMMONS TO REVIEW TAXATION.

In 1910 Jones, a riparian owner, brought an action against the Llanrwst Urban Council to restrain a nuisance and trespass arising from the discharge of sewage into the river Conway, and the council employed the above solicitors to conduct their defence.

On December 6, 1910, Parker J. gave judgment for the plaintiff with costs. See *Jones* v. *Llanrwst Urban Council.* (1)

The plaintiff's costs were taxed at 1916*l.* 14*s.* 5*d.* and duly paid by the council.

On July 20, 1911, the solicitors delivered their own bill of fees and disbursements, amounting to 2238*l.* 1*s.*, to the council, and on

(1) [1911] 1 Ch. 393.

July 26, 1911, the council obtained the common order to tax this bill under the Solicitors Act, 1843, s. 37.

The taxing Master disallowed (inter alia) certain disbursements for items incurred on the council's special instructions and consisting of the following out-of-pocket payments, namely, 39*l.* 16*s.* 8*d.* shorthand writer's charges for transcript of counsel's speeches; eight small items amounting to 15*l.* 18*s.* 10*d.* printer's charges for ten further prints of evidence and printer's charges for ten further prints of judgment; and 74*l.* 13*s.* 9*d.* printer's charges for composing and printing twenty-five copies of counsel's speeches—total, 130*l.* 9*s.* 3*d.*

On December 11, 1911, the solicitors carried in the following objections:—

"The council gave special instructions to the solicitors to have extra copies of the evidence printed and to have the speeches of counsel transcribed and printed and to have the whole bound up with prints of the judgment so that the council might have a complete record of the trial, and the solicitors in carrying out the council's instructions as they were bound and entitled to do incurred the fees and charges disallowed. It is submitted that on a taxation as between the council and the solicitors the latter are entitled to charge for work done on the council's special instructions, and as the fees and charges are the usual and proper fees and charges the items taxed off should be allowed. The council in this case admit these instructions and do not contest their liability to pay the proper fees and charges."

On February 28, 1912, the taxing Master delivered the following answer overruling the objections:—

"These objections raise not for the first time a question seriously affecting the efficiency of the Supreme Court Taxing Office in dealing with a class of cases that are now coming in with frequency, viz.:—The taxation of costs of solicitors acting for local authorities with a view to the payment of such costs out of public money. The solicitors were instructed by the Llanrwst Urban District Council to defend an action brought by Owen Isgoed Jones against the council for a declaration that they were not entitled to use certain sewers in such a way

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as to convey or cause to pass into the river Conway any sewage or filthy water as in the statement of claim described, for an injunction and for damages. The council failed in their defence to the action and have had to pay the plaintiff's taxed costs of it amounting to 1916*l.* 14*s.* 5*d.* and in addition have to incur a very considerable expense in carrying out the terms of the judgment.

"The bill I am now taxing is that of the solicitors against their own clients the council and the taxation is necessary to meet the requirements of the Local Government Board.

"The contention of the objecting solicitors apparently amounts to this that they are entitled to charge the items disallowed as they are authorised by the council to do so and further that that authorisation of the council entirely debars the taxing Master from dealing with them.

"The acceptance of this contention would I think render taxation of such costs valueless on the very subject where its importance is greatest.

"To take the items in question; there had been an expensive and unsuccessful litigation on a subject involving no question of law, principle or public interest.

"The council then adopt the following resolution—'Resolved that prints of the speeches evidence and judgment be obtained and supplied to each member and that one set be bound in book form.'

"The solicitors were instructed to carry out this resolution and the expenses amounting to over 130*l.* are charged in their bill of costs and are the items disallowed by me.

"I have disallowed them on the ground that I consider such expenditure of money absolutely unnecessary if not absolutely useless and one that I do not think would have been incurred but for the fact that it would not fall on the individual members of the council.

"I think that practically the same point was raised and decided in the case of *In re Frank James & Sons* (1), to which I beg to refer.

"All the objections are overruled."

(1) [1903] W. N. 99.

On March 5, 1912, the taxing Master made his certificate, in which the above items (inter alia) were disallowed, and the bill was taxed at 1909*l.* 4*s.* 9*d.*

On March 19, 1912, the solicitors issued this summons asking that their objections to the taxation might be allowed, and that it might be referred back to the taxing Master to vary his certificate accordingly.

Tomlin, for the solicitors. This was an ordinary taxation between solicitor and client under the Solicitors Act, 1843, s. 37, and the taxing Master was bound to allow the usual charges for items incurred on the client's special instructions, whether the items were really necessary or not. In the present case the usual charges were made, and there is no question of quantum. The taxing Master has disallowed the items as an unnecessary and useless expenditure of public money. But that is not a matter for him at all. That is the business of the auditor under the Public Health Act, 1875, ss. 247, 249. Even where the bill is taxed by the clerk of the peace or his deputy under s. 249 the allocatur is only prima facie evidence of the reasonableness of the amount. The legality of the charge is still a question for the auditor. The audit and the taxation (if any) under the Public Health Act, 1875, are directly concerned with the propriety of the expenditure as between the council and the ratepayers. The liability of the council to their own solicitors is an entirely different matter, and is properly determined by taxation under the Solicitors Act, 1843, s. 37 : *Southampton Guardians* v. *Bell* (1), a decision on s. 39 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), which corresponds to s. 249 of the Public Health Act, 1875. The taxing Master has really acted as a public auditor. This is not the proper mode of taxing as between solicitor and client, and the items should be allowed.

In re Frank James & Sons (2), commented on by Farwell J. in *In re Evans* (3), was evidently a pure question of quantum in respect to an item not authorized by any antecedent instructions. It is very far removed from the present case.

(1) 21 Q. B. D. 297, 300. (2) [1903] W. N. 99.
(3) [1905] 1 Ch. 290, 295.

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In *In re Evans* (1) it was held that a local authority might employ a solicitor for conveyancing work, notwithstanding his election to charge under Sched. II. to the general order under the Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44), instead of by scale, and that the taxing Master, who raised much the same points as in the present case, was bound by the arrangement.

Andrewes-Uthwatt, for the council. We admit the special instructions and that the charges are usual and proper. We do not dispute our liability to pay.

SWINFEN EADY J. (after stating the facts and reading the objections and the answer of the taxing Master). It must be observed that the accounts of the council are subject to audit under ss. 247 and 249 of the Public Health Act, 1875. Sect. 249 provides that on the application of the local authority the solicitor's bill may be taxed by the clerk of the peace of the district or his deputy, "and the allowance of any sum on such taxation shall be prima facie evidence of the reasonableness of the amount, but not of the legality of the charge." Sect. 247, which deals with the audit of accounts, provides by sub-s. 6 that "any ratepayer or owner of property in the district may be present at the audit, and may make any objection to such accounts before the auditor," and sub-s. 7 provides that "any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment." That duty is cast on the auditor by the section, the ratepayers having the right to be present and raise objections.

In the present case the reasonableness of the amount charged for the work done is not in dispute, and no question of quantum is raised. In my opinion the taxing Master in taxing these costs as between solicitor and client was not entitled on the grounds set out in his answer to disallow items incurred on the client's express instructions, and for which the amount charged was reasonable having regard to the work done.

In *Southampton Guardians* v. *Bell* (2) the solicitors' bill had

(1) [1905] 1 Ch. 290, 295.

(2) 21 Q. B. D. 297, 300.

been taxed under s. 39 of the Poor Law Amendment Act, 1844, which is substantially the same as s. 249 of the Public Health Act, 1875. The bill was taxed by the clerk of the peace at 535*l.*, so that the solicitors, who had received 600*l.* on account of costs, were overpaid by 65*l.* The guardians brought an action to recover this amount. The solicitors claimed that they were not bound by the taxation under the Poor Law Amendment Act, 1844, but were entitled to taxation as between solicitor and client under s. 37 of the Solicitors Act, 1843. The question for decision was whether the taxation by the clerk of the peace under the Poor Law Amendment Act, 1844, s. 39, had the effect of disentitling the solicitors to taxation as between solicitor and client under the Solicitors Act, 1843, s. 37. The Divisional Court answered this question in the negative, on the ground that the taxation by the clerk of the peace had reference to the question as between the guardians and the ratepayers, and did not bind the solicitors as between themselves and their clients. Manisty J. said: "If the auditor adopted the allocatur and disallowed the sum claimed, the result would be, in my opinion, notwithstanding some expressions in *Reg.* v. *Hunt* (1), that the propriety of the disallowance could not be disputed as between the guardians and the ratepayers, but that as between the guardians and the solicitors to the board the question would remain open, and the action could be maintained." He then held that the defendants were entitled to an order for taxation under the Solicitors Act, 1843. Stephen J. said: "The object of the section"—Poor Law Amendment Act, 1844, s. 39—"is to prevent the waste of the rates in useless expenditure. The liability of the guardians to their solicitors is quite a different matter, and the defendants are entitled to have their costs taxed by a taxing Master, notwithstanding the taxation by the clerk of the peace."

In the present case the taxing Master has really proceeded on a principle contrary to that decision and taxed the bill on the footing of preventing the waste of the rates in useless expenditure. But the liability of the council to their solicitors is a different matter, and the bill must be taxed on quite a different footing.

(1) (1856) 6 E. & B. 408.

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The taxing Master refers to *In re Frank James & Sons.* (1) That was a different case. In *In re Evans* (2) Farwell J. said: "The case of *In re Frank James & Sons* (1) in the *Weekly Notes* is not fully reported, but so far as I can see it has reference to some particular items in the bill of costs which the parties wished to be paid according to an agreement between them, and which the judge thought ought not to be allowed." A rural council had taken land for public purposes and the value was determined by arbitration. In addition to the usual charges for inspection and hearing evidence the umpire charged an ad valorem fee on the amount of the award. The question on the taxation was really a question of quantum. The taxing Master dealt with it on that footing and reduced the fee by a considerable amount. Apparently after the taxation the council passed a resolution that they were willing to pay the amounts charged by the umpire and refused to sanction proceedings to recover from the umpire the amount disallowed on taxation. This was not the case of a payment by solicitors upon the instructions of the clients, but an attempt by an ex post facto resolution to bind the hands of the taxing Master on a question of quantum. Objections were carried in to the taxation. It was held that the taxing Master could disregard the subsequent resolution, and that he was only bound to allow a reasonable amount for the fee of the umpire.

The present application succeeds, and the case must be referred back to the taxing Master to review his taxation and allow the above items.

Solicitors: *Sharpe, Pritchard & Co., for Porter, Amphlett & Jones, Llanrwst.*

(1) [1903] W. N. 99.

(2) [1905] 1 Ch. 290, 295.

G. R. A.

In re MOORE AND HULM'S CONTRACT. (1)

JOYCE J.
1911.
Nov. 9.

[1911 M. 1441.]

Mortgage—Leaseholds—First and Second Mortgages—Sub-demise—Concurrent Legal Terms—Payment off of Second Mortgage—Surrender of Term—Satisfied Terms Act, 1845 (8 & 9 *Vict. c.* 112).

Leaseholds were mortgaged by a sub-demise for the residue of the original term except the last day. Afterwards by another mortgage they were sub-demised to a second mortgagee for the residue of the original term except the last day, subject to the first mortgage. The second mortgage was paid off during the continuance of the first mortgage and the mortgage deed handed back to the mortgagor. A purchaser of the leaseholds from the mortgagor declined to complete without a formal surrender being obtained of the term created by the second mortgage :—

Held, that by the second mortgage there was vested in the mortgagee a legal term which was not determined nor revested in the mortgagor by mere repayment of the principal money and interest, and that the purchaser was entitled to require a surrender or assignment of the outstanding residue of the term created by the second mortgage.

Held, further, that the Satisfied Terms Act, 1845, does not apply to a mortgage term created by the sub-demise of leaseholds.

VENDOR AND PURCHASER SUMMONS.

On April 1, 1911, the vendor, S. Moore, entered into a contract for sale to the purchaser, G. H. Hulm, of a leasehold house at Sutton demised by an indenture of lease dated November 30, 1898, for a term of ninety-nine years from December 25, 1898, at a yearly rent of 6*l.* and subject to the covenants and conditions therein contained.

The abstract of title furnished by the vendor commenced with the lease above mentioned, and then proceeded with the following documents of title :—

(1.) An indenture of assignment of June 26, 1899, whereby the original lessee assigned the property to W. J. Byles for all the unexpired residue of the original term.

(2.) An indenture of mortgage by sub-demise of June 27, 1899 (hereinafter called "the first mortgage"), whereby W. J. Byles demised the property to Messrs. F. & J. Livingstone for all the unexpired residue of the original term except the last day thereof

(1) Reported by special request.

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by way of mortgage for securing the sum of 650*l.* and interest advanced by them on a joint account.

(3.) An indenture of mortgage by sub-demise (hereinafter called "the second mortgage") of June 28, 1899, whereby W. J. Byles demised the property to H. B. Worrell for all the unexpired residue of the original term except the last day thereof, subject to the said indenture of June 27, 1899, by way of mortgage for securing the sum of 150*l.* and interest.

(4.) A receipt dated May 22, 1911, indorsed on the second mortgage, in the following terms: "I acknowledge to have received all principal money and interest secured by the within written indenture (Signed) H. B. Worrell."

Although the receipt was indorsed on May 22, 1911, by H. B. Worrell on the second mortgage at the request of the vendor and after delivery of the abstract to the purchaser, all the money secured by the second mortgage had in fact been fully paid off on July 11, 1901, when the deed was handed back to W. J. Byles by H. B. Worrell.

(5.) An indenture of surrender of August 25, 1903, indorsed on the first mortgage, whereby, in consideration of the payment of all principal money and interest secured by the first mortgage, the mortgagees surrendered to W. J. Byles the property comprised in the original lease to the intent that all the residue then unexpired of the derivative term created by the first mortgage might be merged in the term of ninety-nine years granted by the original lease.

(6.) An indenture of assignment of August 27, 1903, whereby W. J. Byles assigned to the vendor the property in question for all the unexpired residue of the term of ninety-nine years created by the original lease subject to the rent thereby reserved and the covenants and conditions therein contained.

On behalf of the purchaser the objection was taken that the acknowledgment signed by H. B. Worrell was not a sufficient discharge of the second mortgage, and the vendor was required to obtain a formal surrender of the term thereby created.

This was a summons by the purchaser raising (inter alia) the question whether the vendor was not bound to obtain a surrender of the second mortgage term.

Hughes, K.C., and *Bertram Jacobs*, for the purchaser. A mere receipt for the money secured by the second mortgage is not sufficient. There must also be a surrender of the mortgage term. There was an actual term created by the second mortgage deed and the second term takes effect when the first drops and would convey the right to the rent if there were a rent.

The Satisfied Terms Act, 1845, only relates to terms created immediately out of the inheritance, and does not relate to terms created out of leasehold interests. In Dart on Vendors and Purchasers, 7th ed. vol. i. p. 534 and note (*g*), it is said that "as a general rule, the assignment of satisfied terms is rendered unnecessary or impracticable by the Satisfied Terms Act, 1845 the Act, however, does not appear to extend to copyholds, customary freeholds, or leaseholds, that is, where a term is created by sub-demise."

Stronge v. *Hawkes* (1) and *Anderson* v. *Pignet* (2) shew that the purchaser is justified in requiring the surrender of the outstanding term. [He also referred to Carson on Real Property Statutes, 2nd ed. pp. 527, 528; Davidson's Conveyancing, 4th ed. vol. ii. pt. i. p. 306, note (*a*); and Davidson's Concise Precedents, 15th ed. pp. 20—27.]

P. F. Wheeler, for the vendor. After the first mortgage the mortgagor had nothing left in him but a one day reversion. So far as creating a subsisting legal term, the second sub-demise was a mere nullity. There was no reversion granted by the second mortgage, which was a good equitable charge but nothing more. If the first mortgage had been paid off during the continuance of the second mortgage the mortgage term under the first mortgage would have gone to the reversioner, the mortgagor, and not to the second mortgagee. In speaking of equitable mortgages by deed and their discharge by indorsed receipts the authors of vol. ii. pt. ii. of Davidson's Conveyancing, 4th ed. p. 278, say that "when the mortgage has already been discharged by attested receipt, it is probable that the mortgagor would not in dealing with another person be compelled to procure a reconveyance or release by deed. At any rate, he ought not to be so compelled"; and note (*c*) on p. 269 of vol. ii. of Key and

(1) (1856) 2 Jur. (N.S.) 388. (2) (1872) L. R. 8 Ch. 180, 189.

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Elphinstone's Conveyancing, 9th ed., supports the view that an indorsed receipt is sufficient to discharge an equitable mortgage of any property, whatever may be its form.

As a legal term this is absolutely void: *Neale* v. *Mackenzie*. (1) The only way in which a second lease granted by deed may work is by estoppel, and if there had been no mention of the first mortgage in the second mortgage, then there might have been a term by estoppel. But the second mortgage is made expressly subject to the first mortgage and there can be no estoppel where the truth appears.

Further, this is a satisfied term within the meaning of the Satisfied Terms Act, 1845. In the note to p. 822 of vol. ii. pt. ii. of Davidson's Conveyancing, 4th ed., it is said with reference to that Act: "Previously to the Act to render the assignment of satisfied terms unnecessary (8 & 9 Vict. c. 112), upon the redemption of a mortgage for a term of years (except in the rare case of there being a proviso for cesser, and of the payment being made in exact compliance with the proviso), it was necessary that the term should either be assigned to a trustee to attend the inheritance, or be surrendered so as to merge in the immediate reversion. By the operation of that statute, however, a term of years becoming satisfied (as is the case when it is a mere security for a mortgage debt and the mortgage is discharged) immediately ceases, so that an assignment or surrender of the term would be nugatory, and it is sufficient to preserve evidence of its having become satisfied." That exactly applies to this case.

In *Anderson* v. *Pignet* (2) the point was not argued or decided.

Hughes, K.C., in reply. There may be any number of concurrent terms: Woodfall on Landlord and Tenant, 18th ed. p. 241. Even if the second term is shorter than the first the grantee of the second term still gets an interest. *Neale* v. *Mackenzie* (3) shews that when the second lease is under seal it is not void, and that is borne out by *Ecclesiastical Commissioners of Ireland* v. *O'Connor*. (4) The second lease is a lease of the reversion, and the term thereby granted must be duly surrendered.

(1) (1836) 1 M. & W. 747, 759, 761.
(2) L. R. 8 Ch. 180.
(3) 1 M. & W. 747.
(4) (1858) 9 Ir. C. L. Rep. 242.

JOYCE J. A great many interesting and curious points have been raised in this case, but I do not consider it necessary to discuss the authorities cited.

Mr. Wheeler rests his defence on one or two points. He says, first, that there was no necessity or reason for Worrell, the second mortgagee, to surrender the term granted to him by the second mortgage because no legal term or interest passed to him. Bearing in mind, however, the cases cited to me by Mr. Hughes I think that a legal estate or interest did pass to the second mortgagee. I think that Worrell acquired a legal reversion upon the term created by the first mortgage. I think that he got a legal term under his mortgage. If the money secured by the earlier mortgage had been paid to the first mortgagee on the date fixed for payment I think that the second mortgagee would have had a right to the actual possession of the leasehold premises, and if the lease granted by the first mortgage had been terminated in any manner during the continuance of the second mortgage, the second mortgagee would have been entitled to possession for the rest of the term created by his mortgage. Therefore I think that the argument for the vendor on the first point fails.

Now with regard to the second point, namely, that when Worrell the second mortgagee was paid off his term became a satisfied term, and that the Satisfied Terms Act, 1845, operated upon this term. So far as I can see, the opinion of the most learned conveyancers and the reasons given by them shew that the Act did not operate upon it and that it did not become a satisfied term. I am not going to differ from them. I think they are right and that this Act does not apply in the case of the mortgage by demise of a leasehold interest to the mortgage term thereby created.

There must be a declaration that the vendor is bound to obtain a surrender of the term created by the second mortgage.

Solicitors : *Indermaur & Brown, for T. Roberts, Newport, Mon.; Edridge & Newnham.*

R. M.

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[1911 G. 239.]

ATTORNEY-GENERAL *v.* GREAT CENTRAL RAILWAY COMPANY.

[1911 A. 826.]

Highway—Dedication—Railway Company—Land vested in Railway Company for Purposes of their Undertaking—Lines of Rails—Sidings—Power of Railway Company to dedicate—Ultra vires—Evidence of User immaterial—Special Act—Extinguishment of Public Rights—Compulsory Powers—Land acquired by Agreement.

A railway company cannot grant, and therefore cannot dedicate, to the public a perpetual right of way over and across their lines of rails or over land acquired by them for the purposes of their undertaking and which is required or intended, and would naturally come to be used, for lines of rails.

Where a railway company, in pursuance of the powers conferred by their special Act, acquired a section of a public road for the purposes of laying across it and working lines of rails for traffic and sidings, and the public rights of way over the land so acquired were legally extinguished, evidence of subsequent trespass and user by the public will not avail to establish a re-dedication to the public of a right of way over the land in question inconsistent with the user of the land by the railway company for the purposes for which they acquired it.

A railway company were empowered by a special Act (incorporating the Lands Clauses Consolidation Acts) to enter upon, take, use and appropriate to the purposes of their undertaking certain land which was subject to public rights of way. By s. 37 of the special Act it was provided that "all rights of way over any of the lands which shall under the compulsory powers of this Act be purchased or acquired shall be and the same are hereby extinguished." The company purchased and acquired the land by agreement from the respective owners, no notice to treat being previously served:—

Held, that the section applied only to land which was in fact acquired by the exercise of compulsory powers, and did not extend to land acquired by agreement under the provisions or powers of the special Act; and that the public rights of way had not been extinguished over the land acquired by agreement.

ACTIONS.

Under the powers conferred by an Inclosure Act of 1784

(24 Geo. 3, sess. 2, c. vii.) for enclosing open fields, commons, and waste grounds within the manors and lordships of Hexthorpe-with-Balby and Long Sandall, in the Soke of Doncaster, in the West Riding of the county of York, the commissioners thereunder duly made their award and therein set out and appointed (inter alia) a public road forty feet wide, which was afterwards duly made and became known as Littlemoor Lane.

The public rights of way over consecutive portions of this road and coloured respectively green, red, and yellow in the plaintiff company's plan annexed to their pleadings formed the subject-matter of this action.

The material facts relating to the portion coloured green were as follows:—

Under the powers conferred by the South Yorkshire Railway and River Dun Act, 1850, the South Yorkshire and River Dun Company (hereinafter called "the South Yorkshire Company") in the year 1862 owned and were working lines of railway and sidings (which sidings were used for the purposes of coal traffic and constituted part of their coal yard) across and upon the level of part of Littlemoor Lane forming the portion coloured green.

By s. 27 of the South Yorkshire Railway (Sheffield and Thorne) Act, 1862, it was provided that the South Yorkshire Company "may permanently close the road and footpath crossing their coal yard at Hexthorpe and the site and soil of the said road and footpath shall vest in the company."

Shortly afterwards the South Yorkshire Company permanently closed the portion of Littlemoor Lane coloured green which was crossed by their lines and sidings, and the same had ever since remained closed and had ceased to be or form part of a public road or footpath.

By the South Yorkshire Railway and River Dun Company's vesting Act, 1874, the South Yorkshire Company's undertaking became absolutely vested in the plaintiff company under their then name of the Manchester, Sheffield and Lincolnshire Railway Company, which name was changed by the Great Central Railway Act, 1897, to that of the Great Central Railway Company.

In February, 1911, the defendant council by their clerk demanded that a door which formed part of the north-western

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boundary of the portion coloured green and separated it from the northern part of Littlemoor Lane (now known as Barnstone Street) should forthwith be unfastened and opened. Upon the plaintiff company's refusal to comply with this demand the defendant council caused the door to be forcibly opened and the fastenings thereof broken, claiming that a public right of way existed over the portion coloured green.

The plaintiff company then commenced the action first above mentioned [1911 G. 239] for a declaration that the public were not entitled without the consent of the plaintiff company to any right of way over or along the portion coloured green, and for an injunction restraining the defendant council from wrongfully entering upon the portion coloured green and from removing or damaging the walls, fences, gates or doors forming its north-western boundary.

The defendant council denied that s. 27 of the South Yorkshire Railway (Sheffield and Thorne) Act, 1862, related to the portion coloured green, or that the same was closed permanently or at all, and in the alternative alleged that if s. 27 did relate to the portion coloured green the plaintiff company or their predecessors had dedicated to the public a right of footway over the same, or alternatively a right of way for all purposes. Various other defences were raised not material for the purposes of this report.

The defendant council also by way of counter-claim asked for certain declarations, hereinafter more particularly mentioned, relating to the public rights of way over the portions of Littlemoor Lane coloured green, red, and yellow.

In a letter dated December 23, 1911, from the defendant council to the plaintiff company's solicitor the defendant council admitted that the road referred to in s. 27 of the Act of 1862 was a part of Littlemoor Lane.

The material facts relating to the portion coloured red were as follows:—

By s. 11 of the Manchester, Sheffield and Lincolnshire Railway Act, 1875, the plaintiff company under their then name were authorized to enter upon, take, use and appropriate to the purposes of their undertaking,—and under certain indentures of conveyance dated respectively in 1877 and 1880 they purchased and acquired

from the Corporation of Doncaster and Frank Ramsden, the respective owners,—so much of the land formerly occupied by part of Littlemoor Lane as lay within or across the portion coloured red.

In pursuance of the powers conferred by the Act of 1875, the plaintiff company placed, maintained, and used lines of railway sidings over and along the portion in question.

The material facts relating to the portion coloured yellow were as follows:—

By s. 10 of the Manchester, Sheffield and Lincolnshire Railway (Various Powers) Act, 1891 (which incorporated the Lands Clauses Acts), the plaintiff company were authorized to enter upon, take, use and appropriate to the purposes of their undertaking,—and under indentures of conveyance dated December 10, 1891, and March 1, 1892, respectively the plaintiff company purchased and acquired from the Corporation of Doncaster and Frank Ramsden, the respective owners,—so much of the land formerly occupied by part of Littlemoor Lane as lay within or across the portion coloured yellow.

No notice to treat in respect of these lands had been served on the owners, but the company acquired them by agreement under the provisions of the Act.

Sect. 36 of the Act of 1891 provided for the stopping up of a certain public footpath and road in Great Grimsby.

By s. 37 of the said Act of 1891 it was provided that "all rights of way over or along the roads footpaths level crossings or other highways or portions thereof which shall under the provisions of this Act be stopped up and all rights of way over any of the lands which shall under the compulsory powers of this Act be purchased or acquired shall be and the same are hereby extinguished."

In pursuance of the powers conferred by the said Act of 1891 the plaintiff company placed, maintained, and used lines of railway sidings and buildings over, along, or upon the portion coloured yellow.

In their counter-claim to the original action [1911 G. 239] the defendant council claimed declarations that the portions of Littlemoor Lane coloured green, red, and yellow were a public

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highway for all kinds of traffic or alternatively for foot traffic; that the lines of railway and sidings and buildings and fences on the portions coloured red and yellow were unlawful obstructions of Littlemoor Lane and were a public nuisance and a trespass; and that the highways in question had never been lawfully stopped up or diverted and that the same ought to be forthwith restored to the public.

In their defence to this counter-claim the plaintiff company alleged that in pursuance of the powers conferred upon them by the said Acts of 1875 and 1891 they had stopped up and extinguished all rights of way over the portions coloured red and yellow or in connection therewith.

Subsequently, the Attorney-General, on the relation of the Urban District Council of Balby-with-Hexthorpe, and the district council commenced the action secondly above mentioned [1911 A. 826] against the Great Central Railway Company, in which the Attorney-General claimed declarations that the portion of Littlemoor Lane coloured green was a public highway for all kinds of traffic or alternatively for foot traffic; that the lines of railway sidings, buildings, and fences on the portions coloured red and yellow were unlawful obstructions of Littlemoor Lane and a public nuisance; and also an injunction to restrain the railway company from allowing any lines or other obstructions to remain in or across the portions coloured red and yellow and from stopping or interfering with the user thereof by the public; and he further claimed a declaration that the highways in question had never been lawfully stopped up or diverted and that the same ought to be forthwith restored to the public.

The two actions were consolidated and now came on together for hearing.

Evidence of user by the public was given on behalf of the urban district council at the trial for the purpose of shewing that a footway over the portion coloured green had been dedicated to the public by the railway company.

Sir A. Cripps, K.C., *Younger, K.C.*, and *H. C. Bischoff*, for the plaintiff company in the first action. By s. 27 of the South Yorkshire Railway (Sheffield and Thorne) Act, 1862, the

railway company were empowered to close the road and footpath crossing their coal yard over the portion coloured green, and shortly afterwards they were duly closed and have remained closed ever since. At first the defendant council denied this, but they have subsequently admitted it, and the only question now remaining with regard to the portion coloured green is the question of re-dedication thereof alleged by the defendant council.

The plaintiff company contend that there cannot have been dedication or re-dedication to the public because that would have been outside the statutory powers of the company, and, if so, then user or not by the public is quite immaterial. If user be material, then the railway company have all along done their best to stop trespassing.

A railway company cannot dedicate their land to the public so as to interfere with their statutory duties or with future improvements which they may want to make: *Ayr Harbour Trustees* v. *Oswald* (1), applied in *In re South Eastern Ry. Co. and Wiffin's Contract.* (2) Such a dedication as alleged would be necessarily inconsistent with the purpose of a coal yard and coal exchange for which the company are under statutory authority using this land: *Rex* v. *Leake* (3); *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (4); *Greenwich District Board of Works* v. *Maudslay* (5); *Mulliner* v. *Midland Ry. Co.* (6); *Foster* v. *London, Chatham and Dover Ry. Co.* (7); *Grand Junction Canal Co.* v. *Petty* (8); *Great Western Ry. Co.* v. *Solihull Rural Council* (9); *Edinburgh Corporation* v. *North British Ry. Co.* (10); *Attorney-General* v. *London and South Western Ry. Co.* (11); *Taff Vale Ry. Co.* v. *Pontypridd Urban Council* (12); *Lancashire and Yorkshire Ry. Co.* v. *Davenport* (13); *Arnold* v. *Morgan* (14); *Staffordshire and Worcestershire*

(1) (1883) 8 App. Cas. 623.
(2) [1907] 2 Ch. 366.
(3) (1833) 5 B. & Ad. 469.
(4) (1866) L. R. 1 H. L. 254.
(5) (1870) L. R. 5 Q. B. 397.
(6) (1879) 11 Ch. D. 611.
(7) [1895] 1 Q. B. 711.
(8) (1888) 21 Q. B. D. 273.
(9) (1902) 86 L. T. 852.
(10) (1904) 6 F. 620.
(11) (1905) 3 L. G. R. 1327; 69 J. P. 110.
(12) (1905) 3 L. G. R. 1339; 69 J. P. 351.
(13) (1906) 4 L. G. R. 425; 70 J. P. 129.
(14) [1911] 2 K. B. 314.

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Canal Navigation v. *Bradley*. (1) Those cases go to establish the proposition that a statutory body cannot dedicate land for a public footpath inconsistently with their statutory rights and duties, and the test is not merely actual user but possible user. In the present case the dedication to the public use of this portion coloured green for a coal exchange and traffic is quite inconsistent with the statutory duties of the company.

Further we submit that s. 37 of the Act of 1891 deals with public rights of way and not with private rights of way which are the subject of compensation under the Lands Clauses Consolidation Act, 1845,—*Wells* v. *London, Tilbury and Southend Ry. Co.* (2)—and that the public rights over the yellow have been extinguished, and that being so, the public rights over the intervening portion coloured red are also extinguished: *Bailey* v. *Jamieson*. (3)

Hughes, K.C., Buckmaster, K.C., and *J. Scholefield*, for the defendant council in the first action and for the plaintiffs in the second action. Assuming that the public rights of way over the portion coloured green are gone as the result of the Act of 1862 and the subsequent closing of the way, then, subject to the question of re-dedication of a way by the railway company, the questions concerning the portions coloured red and yellow remain.

The existence of any public rights over the portion coloured red depends upon the question whether the public rights over the yellow are gone, because the red portion being in the middle, between the portion coloured green and the portion coloured yellow, the decision in *Bailey* v. *Jamieson* (3) shews that if the public rights over the yellow are gone the rights over the red portion are lost.

The question whether the public rights over the yellow portion have been taken away depends upon the Manchester, Sheffield and Lincolnshire Railway (Various Powers) Act, 1891, and we submit that that Act has not taken them away.

The latter part of s. 37 of that Act does not relate to public rights at all. The Act does not stop up any public highway

(1) [1912] 1 Ch. 91. (2) (1877) 5 Ch. D. 126.
(3) (1876) 1 C. P. D. 329.

except those referred to in s. 36, which section was unnecessary if s. 37 also extends to public rights of way. If the latter part of s. 37 does refer to public rights of way, then it only applies to lands acquired under the compulsory powers of the Act, for the latter part of the section makes compulsory acquisition a condition precedent to the extinction of the highway. There is nothing in the conveyances of the land to the company which points to a compulsory taking, and the mere acquisition of the soil of the land does not extinguish rights over the surface.

The railway company must shew clearly that there is power to stop up the road, and, unless the special Act gives it, there is no power under the Railways Clauses Consolidation Act, 1845, to stop a highway: *Dartford Rural Council* v. *Bexley Heath Ry. Co.* (1); *Attorney-General* v. *Great Northern Ry. Co.* (2); *Cole* v. *Miles* (3); *Barnard* v. *Great Western Ry. Co.* (4) *Wells* v. *London, Tilbury and Southend Ry. Co.* (5) related to a private right of way and does not apply to this case.

The yellow land was not compulsorily acquired. In *Barnard* v. *Great Western Ry. Co.* (4) there was a section of the special Act very similar to s. 37, and that case shews that the section related to private rights, if not exclusively to private rights, and that, whether public or private rights, if the lands were acquired by agreement which was not prefaced by a notice to treat, the right of way was not extinguished. Notice to treat is not a compulsory taking, though it may lead up to it: *Guest* v. *Poole and Bournemouth Ry. Co.* (6) It is a neutral proceeding: *In re Uxbridge and Rickmansworth Ry. Co.* (7)

Hooper v. *Bourne* (8) related only to the application of the "superfluous land" clauses of the Lands Clauses Consolidation Act, 1845. There is nothing to shew that the rights over the yellow have been taken away under any statutory authority or that the land was acquired compulsorily. The Attorney-General is entitled to an injunction in respect of the yellow and red

(1) [1898] A. C. 210, 214.
(2) (1850) 4 De G. & Sm. 75.
(3) [1888] W. N. 150; Hunter's Preservation of Open Spaces, 2nd ed., Appendix XI., p. 526.
(4) (1902) 86 L. T. 798.
(5) 5 Ch. D. 126.
(6) (1870) L. R. 5 C. P. 553.
(7) (1890) 43 Ch. D. 536.
(8) (1877) 3 Q. B. D. 258.

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portions, for a public footpath can still be a highway though it has ceased to be of any public utility and has in fact become a cul-de-sac: *Reg.* v. *Burney.*(1)

If, however, we are wrong in our contention upon s. 37, then we say that there has been a re-dedication, evidenced by user, of the yellow portion.

Sir A. Cripps, K.C. (*Younger, K.C.*, and *Bischoff* with him), for the defendant railway company in the second action. An Act of Parliament is not to be construed by the particular bargains which parties have put in for themselves: per Lord Cairns L.C. in *East London Ry. Co.* v. *Whitechurch.*(2) The cases referred to do not shew any case for limiting the words of s. 37 to private rights of way. Looked at from the wider point of view there is really no distinction in principle between lands taken compulsorily and by agreement, because, after all, the compulsory powers induce agreement: *Hooper* v. *Bourne* (3); *City of Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (4); *London and North Western Ry. Co.* v. *Howley Park Coal and Cannel Co.* (5); and so long as there are compulsory powers the company buy by virtue of them no matter whether they buy directly under them or indirectly by agreement.

There can have been no re-dedication of the portion coloured yellow whether it was acquired compulsorily or by agreement: *Edinburgh Corporation* v. *North British Ry. Co.* (6); and that a cul-de-sac was re-dedicated is unthinkable.

The railway company cannot be made to take up the lines of rail which they were perfectly entitled to lay down. If the right of way has not been stopped up, then the obligation on the company is under s. 61 of the Railways Clauses Consolidation Act, 1845. In the circumstances, there has been such delay that a mandatory injunction should not be made: *Attorney-General* v. *Grand Junction Canal Co.*(7)

Hughes, K.C., in reply. The construction of s. 37 of the Act of 1891 contended for on behalf of the railway company is an

(1) (1875) 31 L. T. 828.
(2) (1874) L. R. 7 H. L. 81, 89.
(3) 3 Q. B. D. 258.
(4) (1871) L. R. 2 H. L. Sc. 160.
(5) [1911] 2 Ch. 97.
(6) 6 F. 620.
(7) [1909] 2 Ch. 505.

impossible construction, and would amount to this, that wherever on the deposited plans a highway crossed any of the lands shewn on the plans it would be stopped.

Delay or laches is not pleaded and is not applicable, for once a highway always a highway: *Harvey* v. *Truro Rural Council.* (1) A highway can only be stopped up by Act of Parliament or an order of quarter sessions. *Attorney-General* v. *Grand Junction Canal Co.* (2) was a case, not of a highway, but of enforcing a statutory obligation, which is an entirely different matter.

JOYCE J. The dispute in this case is as to the existence of a public right of way over pieces of land shewn on the map referred to during the discussion and thereon coloured green, red, and yellow respectively. The circumstances are different with respect to the portions so differently coloured on this map.

Many years back all these pieces formed part of what I understand was an awarded road. Mr. Buckmaster read to me, without going to the Act of Parliament which authorized the award—and I do not think I have seen it—an award, as I understood it, of this road now in dispute over the green, red, and yellow. However, the original action, which is by the plaintiff company against the urban district council of Balby-cum-Hexthorpe, notwithstanding that a good deal was said to the contrary by Mr. Buckmaster, relates only to the land coloured green upon the map. With reference to that, s. 27 of the South Yorkshire Railway (Sheffield and Thorne) Act, 1862, provides that the company (that is the company who were the predecessors of the plaintiff company, the Great Central Railway Company) may permanently close the road and footpath crossing their coal yard at Hexthorpe, and that the site and soil of the said road and footpath shall vest in the company. The plaintiffs in this action (that is the Great Central Railway Company) have all along contended that that section applies to the portion of the awarded road over the green. For a long time, however, this was strenuously denied by the defendants, the urban district council, but ultimately, at quite a late period of the proceedings,—I think as late as December last—the denial by the urban district council

(1) [1903] 2 Ch. 638, 644. (2) [1909] 2 Ch. 505.

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of the application of this section to the locus in quo was withdrawn; and, therefore, I may take it as established that, whatever may have happened since, the road and footpath over the piece of land coloured green on the plan were legally closed soon after 1862—that is in 1863 or 1864. I do not mean to say that they were closed by the Act alone, but they were closed by the Act and what the board of directors of the South Yorkshire Company did in pursuance of the 27th section of the Act.

That being so, in order to make out that there is still a public footway over the land coloured green, the urban district council, the defendants to this first action, have set up various contentions, and, amongst other things, this: that there has been a re-dedication by the company for the time being—I do not know exactly which company—to the public of a right of way—they do not say it was any more than a footpath—over what is coloured green on this map.

A great number of cases were cited to me as to the power in a railway company to make such a dedication, and in particular the Scottish case of *Edinburgh Corporation* v. *North British Ry. Co.* (1) was cited. It is a very long case which I have not had an opportunity of reading, and I am not sure what the exact point decided was, but at any rate it was very like this case. However that may be, I do not think there is any doubt whatever about the law in reference to such a matter, and you may take it from almost any text-book you like—I could name two or three, but perhaps the most convenient one for me to refer to is Pratt and Mackenzie's Law of Highways, 16th ed. There it is stated in this way at p. 25: "Trustees in whom land is vested for public purposes, and statutory corporations holding land for the purposes of their undertaking, may dedicate the surface to the use of the public as a highway, provided such use is not incompatible with the present or future execution of the purposes for which the land is vested in them." Then instances are given, and there is a well-known case mentioned which occurred with respect to the towing path belonging to a canal company. But there can be no dedication where there is sufficient evidence to shew that the dedication is inconsistent with such purposes.

(1) 6 F. 620.

Whether the public use of land as a highway is or is not compatible with the purposes for which it is vested in the trustees or corporation is a question of fact, and here I have no hesitation in finding, as a fact, that the use by the public of a highway over the rails which cross the land coloured green is, certainly at the present time, inconsistent with the safety of the public and incompatible with the use for which the land is vested in the railway company. Let it not be taken that I am forgetting that this piece of land coloured green had not all along (at least, I assume that it had not) as many lines of rails as it has upon it now. I assume and understand that, at and prior to any time when a dedication could be alleged, there were lines of railway over the green; and this also must be borne in mind, that the public right of way over the green was legally stopped by or in pursuance of an Act of Parliament, and I have no doubt about that whatever.

With reference to the law, that is really all stated in the case of *Great Western Ry. Co.* v. *Solihull Rural Council* (1) in the Court of Appeal. But I should just like to refer to a passage in *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (2), where, speaking of *Mulliner* v. *Midland Ry. Co.* (3), Rigby L.J., who was usually correct in his statement of the law, says this: "But as to the case of *Mulliner* v. *Midland Ry. Co.* (3), which was cited against them, that seems to have no reference to a case of this kind." (That was a case of the kind under discussion.) "There the land was purchased by a railway company, and was vested in them for the purposes of the railway, and for no other purpose. I conceive that the decision of the Master of the Rolls in that case was in accordance with the law, and I do not know that it has ever been seriously disputed. No doubt it has been tried, as in the present case it has been tried, to extend that decision beyond what the Master of the Rolls meant; but such attempts have failed. His decision was that a piece of land taken for the purposes of the railway company, and required for the purposes of the railway company, cannot be alienated by them"—that

(1) 86 L. T. 852. (2) [1896] 2 Q. B. 439, 449.
(3) 11 Ch. D. 611.

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means by the company—"without special authority from Parliament, and that is undoubted law. The Master of the Rolls in that case went somewhat further, and said that they not only could not allow the land itself to be alienated, but that no perpetual right of way could lawfully be created by them;" (that means over land similar to this little bit coloured green) "and I think that is a reasonable deduction from the other proposition that the land cannot be alienated."

I have not the slightest hesitation in deciding here,—if it has not been decided already in this country,—as I am told it was in the Scottish case, that a railway company cannot grant to the public a perpetual right of way over their lines of rails,—I am not saying anything about a bridge over the railway,—but across their lines of railway over land which is required or intended and would naturally come to be used for lines of rails. I have not the slightest doubt about it. I think the land coloured green here is such land, and therefore I do not hesitate to decide (and I do it on the assumption I have already mentioned) that the railway company could not have granted, and therefore could not have dedicated if they had wanted to do so, a public right of way across the lines of railway in their coal yard over the piece of land coloured green.

My view being that a railway company cannot grant or dedicate a right of way over their lines of rails, it is really unnecessary for me to consider the evidence which has been adduced in order to shew that there has been such a dedication—not, I suppose, that there has been actual or express dedication—because I am quite sure that nothing has ever been further from the intention of the railway company than to dedicate a right of way over this piece of land coloured green. But even if I did not take the view which I do of the law in reference to dedication of a right of way by a railway company, I should not, in all the circumstances of this case, considering the dispute as to trespass which has been going on a great part of the time, and considering that the right of way over this railway was closed by Act of Parliament, for the Legislature thought it necessary to be closed,—have held that there has been any re-dedication, or dedication at all, of a right of way to the public over the green.

Then several other defences are raised (I am speaking of the original action with reference to the green), but when the facts are investigated with reference to them, it appears to me that really they need not be seriously considered, and in fact, as soon as the facts were known, I do not think they were seriously urged. Consequently, so far as the first action is concerned, I decide that the public right of way over the green has been legally extinguished and is no longer in existence.

Now I have to consider the parts which are respectively coloured red and yellow on the map. The red was acquired by the plaintiff company under their then name of the Manchester, Sheffield and Lincolnshire Railway Company under the powers conferred upon them by the Manchester, Sheffield and Lincolnshire Railway Act, 1875, which (as was admitted) authorized the company to "enter upon, take, use and appropriate to the purposes of their undertaking" the piece of land coloured red on the map. It is common ground that the company had power under the Act of 1875 to take that land and that they did take it. But the Act does not extinguish the public rights; nor is it contended by the railway company that the public rights over the land coloured red have been extinguished, unless the public rights over the yellow have been extinguished, in which case they say, and say reasonably, I think, by reason of the case of *Bailey* v. *Jamieson* (1), that if both ends of a piece of land, which is subject to a public right of way, are closed, and there is no access to the intervening piece for the public, then the latter as a matter of fact is also closed, although, perhaps, technically there may still be some public legal rights existing in respect of it. I think, however, that if the rights of way are extinguished over the yellow, then, on the authority of this case of *Bailey* v. *Jamieson* (1), the railway company would have established that the public rights over the red and yellow were gone.

But how does this case stand with regard to the yellow? That was acquired under the 10th section of the Act of 1891, which authorizes the company (then the Manchester, Sheffield and Lincolnshire Railway Company) to "from time to time enter upon, take, use, and appropriate to the purposes of their

(1) 1 C. P. D. 329.

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undertaking, all or any of the lands and buildings hereinafter mentioned and delineated on the deposited plans," and the yellow is admitted to be included in one of the sub-paragraphs which deals with certain lands and houses in the West Riding of the county of York. The result of the discussion was that the yellow was acquired under the powers of the Act of 1891.

Then we come to deal with s. 37 of that Act, and that provides that "all rights of way over or along the roads, footpaths, level crossings, or other highways or portions thereof which shall under the provisions of this Act be stopped up and all rights of way over any of the lands which shall under the compulsory powers of this Act be purchased or acquired shall be and the same are hereby extinguished." Now I observe that the Act does not say "all rights of way over any of the lands which shall be acquired under the provisions of this Act," nor "all the land which shall be acquired under the powers of this Act," but all rights of way over lands which "under the compulsory powers of this Act" shall be purchased or acquired shall be stopped. I confess, although I daresay people better acquainted with the subject than I am would know, that I do not see the sense of making the stopping of the way depend upon whether the site of the way was taken under the compulsory powers or otherwise; but there are the words of the section. Seeing that in this case there was not even a notice to treat, and notwithstanding the argument addressed to me on behalf of the railway company, still, in my opinion, in face of the decided cases, it is impossible for me, as a judge of first instance, to say that the lands coloured yellow on this map were purchased or acquired under the compulsory powers of the Act of 1891. If that be so, then the public rights of way over the yellow appear to me not to be extinguished, and if they have not been extinguished, neither have the public rights of way over the red been extinguished. This I think disposes of the whole case.

Solicitors: *Dixon Henry Davies; Speechly, Mumford & Craig, for Frank Allen, Doncaster.*

R. M.

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Feb. 27, 28, 29; *March* 8.

[1911 N. 110.]

Company — Debentures — Trust Deed — General Meeting — "Extraordinary Resolution"—Power of Majority to bind Minority—Power to sanction Modification of Rights — Redeemable Debentures — Conversion into Irredeemable — Special Circumstances — Condition Precedent—Additional Powers—"Modification"—"Redeemable"—"Irredeemable"—Meaning of.

A debenture trust deed conferred upon a general meeting of the debenture-holders a power, exercisable by extraordinary resolution passed by a majority of not less than three-fourths of the number of persons voting thereat, to sanction any modification or compromise of the rights of the debenture-holders against the company or against its property, whether arising under the debentures, or the trust deed or otherwise, and provided that an extraordinary resolution duly passed should be binding upon all the debenture-holders:—

Held, that the conversion of redeemable debentures into irredeemable or perpetual debentures was a modification of the rights of the debenture-holders within the meaning of the power, and that the existence of some serious or special circumstances was not a condition precedent to the exercise of the power.

The meaning of "redeemable" and "irredeemable" as applied to debenture stock, and the modification of the rights of stock holders effected by the conversion of redeemable stock into irredeemable stock, discussed by Eve J. in *In re Joseph Stocks & Co.*, post, p. 134, n.

ACTION.

The defendant company was incorporated in 1889 under the Companies Acts, 1862 to 1886, with limited liability. The nominal capital was 225,000*l.* divided into 10,000 ordinary shares of 10*l.* each and 12,500 preference shares of 10*l.* each.

In 1890 the defendant company raised a sum of 200,000*l.* by the issue of a series of first mortgage debentures for 100*l.* each bearing interest at 4*l.* 10*s.* per cent. per annum. By each of the debentures the company covenanted to pay the principal moneys thereby secured on September 30, 1909, or on such earlier date as the same should become payable in accordance with the conditions thereunder written, and in the meantime to pay interest thereon half-yearly at the rate above mentioned, and thereby

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charged with such payment its undertaking and all its property described in the schedule to the trust deed hereinafter mentioned.

Condition 2 provided that the principal moneys should immediately become payable if (inter alia) the company made any default referred to in the trust deed hereinafter mentioned.

Each debenture also provided that the holders of the debentures were to be entitled, pari passu, to the benefit of, and to be subject to, the provisions contained in the trust deed whereby the company vested and covenanted to vest certain property of the company therein specified in the trustees therein named for securing payment of the principal moneys and interest payable in respect of the debentures.

The trust deed contained inter alia a covenant that the company would duly pay the principal moneys and interest secured by the debentures in accordance with the terms thereof and would observe and perform the several conditions indorsed upon the debentures, and provided that the provisions contained in the fifth schedule to the trust deed should have effect in such manner as if such provisions were therein set forth.

Clauses 13, 14, and 15 of the fifth schedule to the trust deed provided as follows:—

"13. Without limiting or derogating from the powers or discretions vested in the trustees a general meeting of the debenture holders shall in addition to the powers hereinbefore given have the following powers exerciseable by extraordinary resolution namely:—

"(1.) Power to sanction the release of any of the mortgaged premises.

"(2.) Power to sanction any modification or compromise of the rights of the debenture holders against the company or against its property whether such rights shall arise under the debentures or under these presents or otherwise.

"(3.) Power to assent to any modification of these presents recommended by the trustees or trustee.

"14. An 'extraordinary resolution' passed at a general meeting of the debenture holders duly convened and held in accordance with these presents shall be binding upon all the debenture

holders whether present or not present at such meeting and each of the debenture holders shall be bound to give effect thereto accordingly.

"15. The expression 'extraordinary resolution' when used in this schedule means a resolution passed at a meeting of the debenture holders duly convened and held in accordance with the provisions herein contained by a majority consisting of not less than three-fourths of the number of persons voting thereat Provided that in computing the majority when a poll is demanded such majority shall be ascertained by reference to the number of votes to which every such person is entitled under these presents."

By a supplemental trust deed dated May 1, 1907, executed in pursuance of an extraordinary resolution passed at a meeting of debenture-holders held on April 19, 1907, the date fixed by the debentures for payment of the principal moneys thereby secured was altered and extended from September 30, 1909, to September 30, 1919, and additional property was assured to the trustees by way of further security. The supplemental deed also provided that nothing therein contained should prejudice or affect any provision contained in the principal trust deed or in the debentures by virtue of which the principal moneys secured by the debentures would on the happening of any event become payable on a day earlier than the date fixed for payment thereof by the debentures as altered by the supplemental deed and every such provision should continue in full force accordingly.

The whole of the above-mentioned issue of debentures was still outstanding, and the plaintiffs were holders for value of fifty of the debentures for the total amount of 5000*l*.

On December 16, 1910, a general meeting of debenture-holders (notice of which had been given on December 7, 1910, and which had been duly convened pursuant to the provisions in the fifth schedule of the trust deed) was held for the purpose of passing as an "extraordinary resolution" a resolution to the effect "that this general meeting of holders of debentures . . . . hereby sanctions and assents to certain proposed modifications of the rights of the holders of the said debentures against the company and its property (and in particular the conversion of

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the said debentures into perpetual debentures) and certain proposed modifications of the said trust deed (as already modified as above mentioned)"—namely, by the supplemental trust deed —" which are recommended by "—the defendant trustees—" (all which proposed modifications have been explained to the meeting) and hereby authorises the trustees of the said trust deed with the view of effectuating such modifications to concur with the company in executing a further supplemental trust deed in the terms of the draft which has been submitted to the meeting and has for the purposes of identification been subscribed by the chairman thereof."

The plaintiff company were represented at the meeting by their secretary and solicitor, who spoke against the resolution, but the same was put to the meeting and upon a poll being taken there were 1238 votes for and 141 against the resolution, which was declared carried. The plaintiff company by their representatives were amongst those who voted against the resolution.

The further supplemental trust deed in the terms of the draft supplemental trust deed sanctioned by the meeting was subsequently executed and contained in particular a provision by which the debentures, in lieu of being redeemable on September 30, 1909, were made unredeemable except in certain events therein specified.

The plaintiff company subsequently commenced this action against the company and the trustees of the trust deed for (1.) a declaration that the resolution passed at the meeting of December 16, 1910, was ultra vires and not binding on the plaintiffs; (2.) an order declaring that the further supplemental trust deed executed pursuant to the resolution was invalid and unauthorized and ought to be set aside; and (3.) an injunction to restrain the defendants from giving further effect to the resolution.

In their statement of claim the plaintiffs alleged that many of the debenture-holders who voted in favour of the resolution were largely interested in the defendant company as shareholders and the resolution was not passed bona fide and in the interest of all the debenture-holders but to benefit the defendant company and

its shareholders, and that there solution was beyond the scope of the authority conferred on a general meeting of debenture-holders by the conditions and regulations indorsed on the debentures.

The plaintiffs also alleged that at the meeting of December 16, 1910, the defendant trustee who was in the chair gave no reasons or justification to the meeting for the resolution or for the various provisions and terms of the draft further supplemental trust deed (as then read) and refused to give any such reasons or justifications though requested to do so by the plaintiffs' representatives; and they further alleged that there was in fact no occasion or necessity for the modification or alteration of rights effected by the resolution or further supplemental trust deed, nor any justification therefor.

Younger, K.C., Buckmaster, K.C., and *Whinney,* for the plaintiff company. The conversion of terminable into perpetual debentures is not a "modification" within the meaning of the trust deed. It is a complete change in the nature of the security and cannot be described as a modification. The resolutions introduce inequalities among the class of debenture-holders inter se and authorize the trustees to give away the mortgaged property, and that is not permissible under any majority clause. Further, no occasion has arisen demanding any such change.

This was not a "modification." The Oxford English Dictionary defines "modification" as "the action of making changes in an object without altering its essential nature or character." The change in question involves the alteration of the essential nature of the debentures, and the essential rights of the debenture-holders. Instead of being a debenture which must be paid off, it has become a debenture which need not be paid off except at the will, or in an event dependent upon the will, of the company: *In re Southern Brazilian Rio Grande Do Sul Ry. Co.* (1) Although payment was postponed by the first supplemental trust deed the covenant for payment was retained, but by the second supplemental deed it is not modified but abolished.

Further, if the alteration be a modification within the meaning of the deed no occasion has arisen for it inasmuch as a crisis or

(1) [1905] 2 Ch. 78.

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difficulty is a condition precedent to the power arising at all: *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico* (1); *Follit* v. *Eddystone Granite Quarries* (2); *Walker* v. *Elmore's German and Austro-Hungarian Metal Co.* (3), per Vaughan Williams L.J.; *Sneath* v. *Valley Gold, Ld.* (4); *In re Joseph Stocks & Co.* (5), in which case there was power to do anything which the Court would have jurisdiction to sanction; the meaning of which was explained in *Shaw* v. *Royce, Ld.* (6) The condition precedent is not fulfilled in this case and there is no substantial ground for the proposed alteration.

Moreover, this is not within the terms of the power. The covenant for payment by the company is released. Modification does not include destruction. The benefits (if any) supposed to be given by this resolution are entirely illusory.

Gore-Browne, K.C., and *Wheeler*, for the defendant brewery company. The Court is asked merely to interpret the deed. This is a question of the law of contract, and a primary rule is that an additional term is not to be introduced into a written contract unless an implication necessarily arises that the parties so intended: *Hamlyn & Co.* v. *Wood & Co.* (7) The plaintiffs seek to read a condition precedent into this contract, namely, that the power of modification should not be exercised unless extraordinary difficulties arise. But there is not a word in the trust deed or schedules to shew that special circumstances must have arisen, and the cases cited on behalf of the plaintiffs have nothing to do with the real question before the Court, with the exception of *In re Joseph Stocks & Co.* (5), which is a decision most strongly in support of the modification in this case. The other cases were cases of compromise and not modification.

The terms on which the company made the offer in this case were not illusory. There is no suggestion of fraud or collusion. Individual holders may have preferred to have a perpetual debenture rather than run the risk of having one of their number wreck the whole business of the company by applying for a

(1) [1893] 1 Ch. 484, n.
(2) [1892] 3 Ch. 75.
(3) (1901) 85 L. T. 767, 770—772.
(4) [1893] 1 Ch. 477.
(5) (1909) 54 Sol. J. 31; see note at end of this report, p. 134.
(6) [1911] 1 Ch. 138.
(7) [1891] 2 Q. B. 488.

receiver. It is true that the modification must be within the terms of the deed,—which we submit it is: *In re Joseph Stocks & Co.* (1),—but the parties have agreed that if what is proposed is good enough for three fourths of the whole body they will all be bound by it. That being so, the Court has no jurisdiction to override the decision of the majority and say that what they have contracted to do they shall not do. The occasion has come when this has been done in good faith. The debenture-holders are not giving up much; they keep their security and their good charge and are getting their 4*l.* 10*s.* per cent. interest.

Hughes, K.C., and *J. K. Young*, for the trustees. The trustees throughout have acted bona fide and with propriety and have done their duty, and there is no suggestion that they were acting unfairly. The decision in *In re Joseph Stocks & Co.* (1) shews that the modification in question was fully authorized by the trust deed.

Buckmaster, K.C., in reply. We do not suggest that there has been any personal misconduct on the part of the defendant trustees.

Cur. adv. vult.

March 8. JOYCE J. This is an action by one only of a large number of persons and companies, the holders of debentures of the defendant brewery company, impeaching the validity of certain resolutions passed by a majority of more than eight to one of these debenture-holders at a meeting duly held pursuant to the provisions of the fifth schedule of the debenture trust deed.

In my opinion the action is not properly constituted, and particularly in that the plaintiffs do not sue on behalf of themselves and other debenture-holders, nor is any one made a party to defend on behalf of or as representing the majority who passed the resolutions. In the circumstances it appears to me that any order I may make will not be binding upon the other debenture-holders.

Upon a former occasion by a similar resolution the period originally fixed for the payment of the debentures was extended

(1) 54 Sol. J. 31; see note at end of this report, p. 134.

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for ten years, namely, from September 30, 1909, to the same date in 1919. Neither the plaintiffs nor any one else, so far as I understand, objected to this. The principal complaint now is that the resolutions impeached, to put it broadly, as in the case of *In re Joseph Stocks & Co.* (1) before Eve J., convert what I believe is commonly, but, perhaps, not quite accurately, termed a redeemable debenture into what is similarly termed an irredeemable or perpetual debenture. These are the expressions, I think, used in s. 103 of the recent Act.

There is a suggestion in the pleadings, and for some time there were insinuations, at least in the speeches of counsel, that the resolutions impeached were not passed bona fide and in the interests of all the debenture-holders, but to benefit the defendant company and the shareholders therein. No evidence, however, in support of these allegations was adduced, so that the case has to be decided upon the documents alone, if we include among these prints of the reports and balance-sheets for the years 1907, 1908, 1909, 1910 and 1911, and a transcript of the shorthand notes of the proceedings at the meeting when the resolutions in question were passed. Ultimately Mr. Buckmaster, counsel for the plaintiffs, disclaimed any imputation of personal misconduct on the part of the defendant trustees. It is quite plain that they simply acted in a regular manner under the advice of their solicitors and counsel, although, of course, they may have been wrong.

Now what I mentioned as being the principal ground of complaint was not in any view of the case an act of the debenture trustees or any other persons or person possessing a fiduciary character. The offence is the vote of the majority of the debenture-holders themselves in general meeting, after discussion, and in face of the opposition of a minority—less than one-eighth; the fact being that the provisions of the debenture trust deed—some of the conditions are at the back of the debenture, but I treat them as if they were all contained in the deed—enabled a certain majority assembled in a certain manner to do what they all individually and collectively might have done if of one mind sui juris and competent. They enabled such a majority to

(1) 54 Sol. J. 31; see note at end of this report, p. 134.

override what I think Mellish L.J. would have called a few "cantankerous" debenture-holders. The powers—such as they were—under which the meeting of debenture-holders acted are contained in clauses 13, 14, and 15 of the fifth schedule to the trust deed. The power of the majority of the debenture-holders to alter the character of the debentures so far as it existed—if it did exist—was conferred by sub-paragraph (2.) of clause 13 in the power to sanction any modification or compromise of the rights of the debenture-holders against the company or against its property, and so on.

In the first place the plaintiffs' counsel, founding themselves upon the observations of Vaughan Williams L.J. in the case of *Walker* v. *Elmore's German and Austro-Hungarian Metal Co.* (1)—where, however, the terms of the clause conferring the powers were quite different from those in the present case—contended that the power conferred by sub-paragraph (2.) of clause 13 could not be exercised unless or until some serious occasion arose, which, to put it broadly, in the judgment of the Court or some one else—I scarcely know whom—rendered it absolutely necessary or plainly expedient that recourse should be had to the exercise of the powers in question, and that the existence of this necessity was in effect a condition precedent to any exercise of the power to modify the rights of the debenture-holders. I do not find any such condition expressed or necessarily implied anywhere in the document, and I may refer to the judgment of Lord Esher M.R. in *Hamlyn & Co.* v. *Wood & Co.* (2) on the subject of implying clauses, a case which was cited to me by Mr. Gore-Browne, although, of course, there cannot be a compromise in the absence of any dispute or unless some question or other has arisen.

What Fry L.J. said in the case of *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico* (3) was nothing about any implied condition, but merely this: "Is this transaction a modification or compromise of the rights of the debenture-holders against the American company or against its property? If this question be answered in the affirmative, the

(1) 85 L. T. 767.
(2) [1891] 2 Q. B. 488, 491.
(3) [1893] 1 Ch. 484, n., 490, n.

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defendants are right; if in the negative, the plaintiffs." What I have to ask myself in this case, I think, is this: Is the transaction in question a modification of the rights of the debenture-holders against the company, or against its property, or is it not? Apart from this contention or theory with respect to the existence of a condition precedent, the plaintiffs advisedly abstained from any attempt to adduce evidence to shew that the conduct of the majority was actually or technically fraudulent, or that the vote was otherwise than perfectly bona fide, regular, and proper, although they did contend that the alteration made or sanctioned could not possibly be regarded as a modification or modifications of the rights of the debenture-holders, but amounted to something much more extensive, and, I suppose would almost say, destroyed their rights. Upon consideration, as I have already intimated, I cannot accede to this contention as to implying a condition precedent to the meeting or voting of the debenture-holders. I am of opinion and decide that the resolutions, so far as they altered the character of the debentures, did not amount to anything more than modifications of the rights of the debenture-holders against the company and its property.

This was the principal question, no doubt, in the action, which but for this objection with reference to altering the character of the debentures would not I think have been brought. [His Lordship dealt with some other matters not material to this report, and then concluded:]

Upon the whole, I think that this action fails, and I do not see my way to take any other course than to dismiss it.

Solicitors: *Lyne & Holman; Druces & Attlee; E. T. Hargraves.*

R. M.

NOTE.

Eve J. October 28, 1909.

In re JOSEPH STOCKS & CO., LIMITED.

WILLEY *v.* JOSEPH STOCKS & CO., LIMITED.

[1907 J. 2269.]

ACTION.

The defendant company was incorporated in 1897 under the Companies Acts, 1862 to 1890.

In November, 1897, the company offered for public subscription 225,000*l.* 4*l.* per cent. debenture stock secured by a trust deed dated January 8, 1898, in the usual form, whereby it was provided that the debenture stock should be held subject to the conditions set forth in the first schedule thereto. The first of the conditions empowered the company at any time before October 1, 1907, to give six months' notice to the stockholders or any of them of the company's intention to redeem the stock held by them at the price of 105*l.* for every 100*l.*, and that at the expiration of the notice the stock would be redeemed accordingly; and the condition further provided that any of the stock not previously redeemed would be redeemed at par on October, 1, 1907, or as soon as the security thereby constituted became enforceable, and that as and when any stock ought to be redeemed in accordance with those presents the company would subject to those conditions pay to the several holders of the stock the redemption moneys therefor, calculated, in the one case, at 105*l.* per 100*l.*, and, in the other case, at par. The third condition provided that every stockholder should be entitled to a certificate under the seal of the company stating the amount of the stock held by him and referring to those presents.

The provisions relating to meetings of debenture stockholders were contained in the third schedule to the trust deed, and clauses 15, 16, and 17 thereof provided as follows:—

"15. A general meeting of the stockholders shall in addition to the powers hereinbefore given have the following powers exerciseable by extraordinary resolution, namely:—

"(1.) A power to sanction the release of any of the mortgaged premises.

"(2.) Power to sanction any compromise or arrangement proposed to be made between the company and the stockholders provided that it is one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof for the time being subsisting if the company were being wound up and the requisite majority at a meeting of the stockholders summoned pursuant to that Act or modification thereof aforesaid had agreed thereto.

"(3.) Power generally to sanction any modification or compromise of the rights of the stockholders against the company or against its property whether such rights shall arise under these presents or otherwise.

"(4.) Power to assent to any modification of the provisions contained in these presents which shall be proposed by the company and assented to by the trustees or trustee.

"(5.) . . . . .

"16. An extraordinary resolution passed at a general meeting of the stockholders duly convened and held in accordance with these presents shall be binding upon all the stockholders whether present or not present at such meeting and each of the stockholders shall be bound to give effect thereto accordingly and the passing of any such resolution shall be conclusive evidence that the circumstances justify the passing thereof the intention being that it shall rest with the meeting without right of appeal therefrom to determine whether or not the circumstances justify the passing of such resolution.

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"17. The expression 'extraordinary resolution' when used in this schedule means a resolution passed at a meeting of the stockholders duly convened and held in accordance with the provisions herein contained at which an absolute majority in value of the whole body of the stockholders shall be present in person or by proxy and carried by a majority consisting of not less than three-fourths in value of such clear majority upon a show of hands or if a poll is duly demanded then by a like majority at the poll."

In 1904 the company was indebted in a considerable amount to its bankers, who having regard to the fact that the debenture stock of the company was falling due at an early date, required their debt to be paid off or substantially reduced. It was eventually agreed between the company and the bank that the debt should be reduced by annual instalments and that the company should arrange with the debenture stock holders to postpone the due date of payment until the debt to the bank should be paid.

In order to carry out this arrangement a meeting of the stockholders was duly convened under the provisions of the third schedule, and held on September 6, 1904, for the purpose of passing as an "extraordinary resolution" the following resolution:—

"That the debenture holders consent to the conversion of their existing 4 per cent. first mortgage debenture stock redeemable at par on the 1st day of October, 1907, into or for 4½ per cent. irredeemable debenture stock. Interest on the new irredeemable stock to commence as from the 1st of October, 1904."

On a poll the resolution was carried, holders of stock to the total amount of 148,500*l.* voting in favour of it, and holders to the amount of 5250*l.* voting against it.

By an indenture of October 3, 1904, made between the company of the one part and the trustees of the other part, the terms of the trust deed were modified by substituting 4½ per cent. for 4 per cent. as the rate of interest on the debenture stock and by taking away from the stockholders the right to repayment on October 1, 1907, or at any time until and unless the company should go into liquidation or make some default by reason of which the charge created by the trust deed should become enforceable, and by conferring upon the company the power to redeem any stock upon giving six months' notice of its intention so to do.

The plaintiffs, who were holders of about 800*l.* debenture stock, some being original subscribers and the others having purchased their holdings in or about 1900, gave notice to the company,—the plaintiff Willey in September, 1904, and the other plaintiffs in April, 1905,—refusing to be bound by the resolution, and that they would rely upon the terms upon which the stock was originally issued.

Immediately after October 1, 1907, the plaintiffs applied to the company for payment of the principal money and interest owing to them in respect of the stock held by them, but the company refused payment, contending that the plaintiffs were bound by the resolution and supplemental deed.

The plaintiffs then commenced this action on behalf of themselves and all other stockholders who had not consented to be bound by the deed of October 3, 1904, against the company and the surviving trustee of the trust deed, claiming (1.) payment by the company of the principal amount of the

stock held by them respectively with interest at 4 per cent., (2.) that the charge created by the trust deed might be enforced by sale, and (3.) so far as necessary, execution of the trusts of the trust deed.

Gore-Browne, K.C., *A. R. Kirby*, and *Tomlin*, for the plaintiffs, contended (inter alia) that the word "irredeemable" in the resolution meant "not redeemable by the mortgagor," and that by converting "redeemable" into "irredeemable" debentures the company had lost its right to redeem; and, further, that as there was in existence no dispute to compromise, the majority of the stockholders had no power to bind the minority by the extraordinary resolution in question. They cited *Hyde* v. *Wrench* (1); *In re Chicago and North West Granaries Co.* (2); *In re Southern Brazilian Rio Grande Do Sul Ry. Co.* (3); *Hay* v. *Swedish and Norwegian Ry. Co.* (4); and *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico.* (5)

Stewart-Smith, K.C., and *Whinney*, for the defendant company.

W. H. Cozens-Hardy, for the defendant trustee.

EVE J. At or about the time the company was incorporated in the month of January, 1898, it proceeded to raise a sum of 225,000*l.* by the issue of 4 per cent. debenture stock secured by a trust deed, in a form well known in the profession now, by which the company purported to charge, and did in fact charge, its assets with repayment of the principal moneys and interest in accordance with the terms of the deed. The terms upon which the stock was issued and held by the stockholders were contained partly in the body of the deed and partly in the schedules attached to the deed.

Under the deed, by virtue of a clause contained in the first schedule, the company had the option of paying off the principal moneys secured by the deed at any time prior to October 1, 1907, provided it gave six months' notice of its intention and paid in addition to the principal moneys a premium of 5*l.* in respect of each 100*l.* paid off. Further, if the company went into liquidation, or if any of the events happened which, according to the tenor of the deed, would make the principal moneys immediately repayable, the company was bound, on the happening of any one of those contingencies, to repay the principal moneys, and finally the company bound itself in any event to pay off the whole of the principal moneys on October 1, 1907. These observations express the obligations of the company and the rights of the stockholders so far as is material for the purposes of this case.

To those rights and obligations were added certain provisions, and by the provision to which I am about to refer power was given to a majority of the stockholders to enter into compromises or arrangements with the company, which, if entered into strictly in accordance with the power conferred upon the majority, were to have the effect of binding the minority and the whole of the debenture stock holders.

The powers conferred upon the majority of the stockholders are to be

(1) (1840) 3 Beav. 334.
(2) [1898] 1 Ch. 263.
(3) [1905] 2 Ch. 78.
(4) (1889) 5 Times L. R. 460.
(5) [1893] 1 Ch. 484, n.

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found, so far as they are material to-day, in clause 15 of the third schedule to the deed, and by that clause a general meeting of the stockholders shall have the following powers exercisable by extraordinary resolution, namely, —I need not read No. (1.), because that is not suggested as having any relevancy in the present discussion—Nos. (2.), (3.), and (4.) are in these words: (2.) "Power to sanction any compromise or arrangement proposed to be made between the company and the stockholders provided that it is one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof for the time being subsisting if the company were being wound up and the requisite majority at a meeting of the stockholders summoned pursuant to that Act or modification thereof aforesaid had agreed thereto. (3.) Power generally to sanction any modification or compromise of the rights of the stockholders against the company or against its property whether such rights shall arise under these presents or otherwise. (4.) Power to assent to any modification of the provisions contained in these presents which shall be proposed by the company and assented to by the trustees or trustee."

In 1904 the company found itself indebted to its bankers in respect of an overdraft to a considerable amount, and according to the correspondence the bank had clearly intimated that it would be no party to any increase of the overdraft, or indeed, as I read the correspondence, to the maintenance of the overdraft at the figure it had then reached unless the company forbore to pay any dividend on its ordinary and preference shares. That no doubt was a serious matter which the directors had to take into consideration, and negotiations having been carried on between the company and the bank, the position ultimately reached was this: that the bank were content to allow the overdraft to be reduced by instalments and dividends to be continued to be paid provided the company could come to some arrangement with the debenture stock holders under which the obligation of the company to make payment of the principal moneys on October 1, 1907, would be done away with; that is to say, the company was to propose to the debenture stock holders so far to modify the rights of the debenture stock holders against the company as to release their right to payment on October 1, 1907.

The bank intimated in the last letter which preceded the meeting to which I am about to refer that this arrangement if carried out must be carried out prior to the end of the month of September, and I rather gather from the correspondence that this was because the preference dividend would in the ordinary course be payable very shortly after the end of that month.

The company by its minutes appears to have left to a committee consisting of Major Edwards and another director, Mr. Baldwin, the carrying out or bringing forward of the proposal which had been made, and which the company as appears by its minutes evidently thought it best to accept, and in due course a notice was issued summoning a meeting of the debenture stock holders to be held on September 6 for the express purpose of considering a resolution embodying the proposal made by the company. The notice of the meeting is clear upon that point, and the meeting was held in accordance with that notice on September 6.

I pass by for the moment the action which the plaintiffs took, but I will come back to it shortly.

At the meeting the resolution the terms of which were stated in that notice was put to the meeting and was defeated on a show of hands, but on a poll being demanded was carried by a very large majority. The plaintiffs, who collectively represent principal sums amounting in all to 800*l.* of the debenture stock, intimated to the company immediately on receipt of the notice of the meeting that they declined to be parties to any such resolution. I think it is quite obvious that from beginning to end the plaintiffs collectively have refused in any way to recognize the right of the majority to bind them by this resolution, and that from first to last they have maintained the position which they asserted then, that they were not bound by the resolution.

In the first place they say that the resolution was in the circumstances ultra vires of the meeting, and in the next place that, even assuming that the resolution was intra vires, it was passed in terms which in fact preserved their rights under the deed of 1898. With regard to the first question, whether or not the resolution was ultra vires of the meeting, that depends upon the true construction to be given to clause 15 of the third schedule to the trust deed. Taking Fry L.J.'s language in *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico* (1) I put to myself the question which he propounds. He says: "Is this transaction," that is to say, the transaction evidenced by this resolution, "a modification or compromise of the rights of the debenture-holders against the American company or against its property? If this question be answered in the affirmative, the defendants are right; if in the negative, the plaintiffs." Now here I have for all practical purposes the same language in clause 15 as that which the Court of Appeal had to consider in clause 22 of the deed before them in the case from which I have read that extract, and I have to ask myself whether the conversion of the stock which had to be paid off on October 1, 1907, into stock in respect of which there was no obligation to pay it off on October 1, 1907, is or is not a modification of the rights of the stockholders. I think it obviously is. The right of the stockholder, as I pointed out in an earlier part of my judgment, was to receive his principal moneys if the company went into liquidation or if the company committed any breach of the covenants on its part contained in the deed, and the right, whatever happened, on October 1, 1907, to be paid off. Those three rights the stockholders enjoyed down to September 6, 1904, and the effect of this resolution was so far to modify their rights against the company as to eliminate from those three rights the absolute right to repayment on October 1, 1907.

In my opinion the question must be answered in the affirmative, and whether it be under sub-sections (2.), (3.), or (4.), or under each of them, that the power arises, in my opinion it was competent for, and within the powers of, a general meeting properly convened by a proper majority to modify the rights of the stockholders by releasing the right to repayment on October 1, 1907.

But Mr. Gore-Browne says that this was not the effect of what was done,

(1) [1893] 1 Ch. 484, n., 490, n.

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that the resolution was not really a contract between the stockholders and the company, but an offer by the stockholders, which the company by its subsequent action has refused to accept. I do not think that is an accurate statement of the order of things. I am bound to hold upon the documents before me that the offer was made and the proposal was put forward by the company, and that the consent of the stockholders to that proposal by the passing of the resolution was an acceptance of that offer and constituted a new contract or a modification of the old contract as between the stockholders and the company.

But further than that, Mr. Gore-Browne argues that, when you look at the terms of this resolution, the true effect of it is to leave the stockholders where they were and to put the company in a less advantageous position. He says that when, by the resolution, the stockholders agreed to convert the stock which was redeemable at par on October 1, 1907, into irredeemable stock, the only effect was to deprive the company of its option to redeem. I agree that, prima facie, the true legal meaning of the word "redeemable" when applied to stock is stock liable to redemption, that is to say, liable to be redeemed at the option of the mortgagor or person who has the right to redeem. North J. in the case of *In re Chicago and North-West Granaries Co.* (1) says, "Does 'redeemable' mean 'liable to redemption,' or does it mean that the debentures are to be all, in fact, redeemed within the specified period? In my opinion, it means that they are to be liable to redemption, and there is no obligation on the company to redeem them." If that be the prima facie meaning of the word "redeemable," the prima facie meaning of the word "irredeemable" when applied to stock is stock that the mortgagor has no power to redeem.

It is contended that those meanings must be attached to the two words "redeemable" and "irredeemable" in this resolution, and that the effect of the resolution is to leave the stockholder a right to demand payment on October 1, 1907, but to deprive the company of any right which it may previously have had to redeem the stock. I cannot so construe this resolution. I think in whatever sense the word "redeemable" is used in the resolution the word "irredeemable" must be held to be used in the contrary sense. The word "redeemable" is used in this resolution in reference to stock which in any event must be paid off. It is not used to describe stock which the company has the option of paying off. It describes stock which the company is bound to pay off, and applying to the word "irredeemable" the contrary meaning, it describes stock which the company is not bound to pay off. I cannot attach to the word "redeemable" the meaning which it undoubtedly must bear in this resolution without attaching to the word "irredeemable" in the same resolution the exact contrary meaning, and I find the less difficulty in doing so when I see that the resolution embodies a concession to the company and not by the company, and one in respect of which the company consents to an increase in the rate of interest on the stock from 4 per cent. to 4½ per cent.

I think the true meaning of this resolution is that the company has proposed and the debenture stock holders have accepted the proposal that the

(1) [1898] 1 Ch. 263, 267.

debenture stock, which, according to the existing state of things, ought to be paid off on October 1, 1907, is to be replaced by debenture stock in respect of which there is to be no such liability on the part of the company.

Accordingly I hold that there was, after the passing of this resolution, no subsisting right in the plaintiffs to demand payment of their principal moneys either by reason of the resolution being ultra vires or by reason of the resolution being so framed as to keep alive their absolute right to payment on the due date.

Under these circumstances I must dismiss the action, and I must dismiss it with costs, but in so doing it must not be understood that I have expressed any opinion as to whether the supplemental deed which was in fact executed on October 3, 1904, gives effect to the contract which I have found to be embodied in the resolution of September 6.

Solicitors: *Whitfield, Dean & Whitfield, for Humphreys, Hirst & Whitley, Halifax; Walker & Rowe, for Frederick Walker & Son, Halifax.*

R. M.

In re EARL OF ARRAN AND KNOWLESDEN & CREER'S CONTRACT.

[1911 A. 1821.]

Vendor and Purchaser—Settled Land—Contract for Sale—Document prior in Date to Commencement of Title — Sale by Tenant for Life — Land in Ireland—Order of Court in Ireland appointing Trustees—Purchase of Land in England—Capital Moneys—Purchaser's Right to inquire into Source of—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 2, *sub-s.* 2—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 3—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 38, 65.

The vendor contracted to sell land in England under a contract fixing the commencement of title in 1874 and stating that he was selling as tenant for life under his statutory power under the Settled Land Acts. The settlement in question was a compound settlement created by several instruments, some of which, including a will made in 1836, were dated or made prior to the time fixed for the commencement of title, and the last of which was a resettlement made in 1902. The vendor had, however, voluntarily furnished an abstract of all the earlier documents constituting the compound settlement except the will of 1836, which was recited in one of these documents dated in 1860.

The compound settlement originally comprised land in Ireland alone, and by an order of the High Court of Justice in Ireland, made in 1908, the present trustees were appointed trustees of the compound settlement for the purposes of the Settled Land Acts. In 1910 the land in England, the subject of the contract, was conveyed to the trustees and their heirs to the uses, upon the trusts, and subject to the powers, charges, and

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provisions to, upon, and subject to which under the compound settlement the freehold lands therein comprised stood limited. The conveyance contained a statement to the effect that the purchase was made at the direction of the tenant for life out of capital moneys in the hands of the trustees arising under the compound settlement:—

Held, that the purchasers were precluded by the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 3, from requiring production of the probate of the will of 1836 or an abstract or copy thereof.

Held, also, that under the order of the Court in Ireland the trustees were in the position of trustees of the settlement for the purposes of the Settled Land Acts in relation to the subsequently acquired land in England without being reappointed by the Court in England.

Held, also, that the purchasers were not entitled to go behind the statement in the conveyance or to require other evidence that the purchase-moneys arose from the sale of land in Ireland subject to the compound settlement.

ADJOURNED SUMMONS under the Vendor and Purchaser Act, 1874, taken out by the vendor.

By a contract dated May 31, 1911, Arthur Jocelyn, the sixth Earl of Arran, agreed to sell and Messrs. Knowlesden & Creer agreed to purchase freehold land situate at Wimbledon, in the county of Surrey, subject to certain conditions of sale which provided that the title should commence with two indentures of mortgage dated April 30, 1874. The conditions stated that the vendor was a tenant for life acting under the powers conferred by the Settled Land Acts, 1882 to 1890, and would only enter into the usual qualified covenants for title.

The settlement in question was a compound settlement consisting of the six following documents:—

(1.) The will dated August 2, 1836, of Arthur Saunders, the third Earl of Arran, who died on January 20, 1837.

(2.) A disentailing assurance dated January 16, 1860, made by Philip Yorke, the fourth Earl, and Arthur Saunders, his eldest son. This deed recited (inter alia) that Arthur Saunders, the third Earl, by his said will devised the land to the use of Philip Yorke, the fourth Earl, during his life with remainder to his first and other sons successively in tail male, and also recited certain powers of jointuring and charging portions in the said will contained, the death of the third Earl, and probate of the said will.

(3.) A resettlement dated March 10, 1860, whereby Philip

Yorke, the fourth Earl, and Arthur Saunders, his eldest son, appointed the estates to the use of H. A. Bruce and F. T. Bircham for a term of 500 years with remainder to the use of Philip Yorke, the fourth Earl, during his life by way of restoration of his former estate, with remainder to the use of Arthur Saunders, his eldest son, during his life, with remainder to the use of his first and other sons in tail male, with remainders over; and it was thereby declared that the term of 500 years was limited upon trust at the request of Philip Yorke, the fourth Earl, and Arthur Saunders, his eldest son, to raise any sums not exceeding 16,000*l.* and pay or apply the same as they should direct, and after the satisfaction of one moiety of the said sums should raise such sums not exceeding 10,000*l.* as the said Arthur Saunders should direct (but with the consent of the said Philip Yorke during their joint lives), and upon further trust, if it should be found convenient to pay off the same, to raise sufficient money to pay off such mortgages. This settlement also contained usual powers of sale and exchange vested in H. A. Bruce and F. T. Bircham as trustees of the settlement and directed the moneys arising thereunder to be invested in the purchase of land in England, Wales, or Ireland.

(4.) A deed poll dated November 25, 1864, executed by Philip Yorke, the fourth Earl, and Arthur Saunders, his eldest son.

(5.) A disentailing assurance dated February 8, 1900, made by Arthur Saunders, the fifth Earl, and his eldest son, Arthur Jocelyn, the present vendor.

(6.) A resettlement dated August 15, 1902, under which the present vendor, Arthur Jocelyn, the sixth Earl, was now tenant for life in possession.

The compound settlement originally comprised land in Ireland alone, and by an order of the High Court of Justice in Ireland dated February 6, 1908, William Dixon Mann Thomson, of Kinston House, Kinston, Warwick, and Hugh Valdave Warrender, of High Grove, Pinner, Middlesex, were appointed trustees of the compound settlement for the purposes of the Settled Land Acts, 1882 to 1890. This order was made on the application of the tenant for life and was entitled in the matter of the Earl of

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Arran's estates in Ireland, settled as to part thereof by the six above-mentioned documents, and as to the remainder thereof by the last four of those documents, the reason being that some further lands had been brought into settlement by the resettlement of March 10, 1860. The order made was that the said "William Dixon Mann Thomson and Hugh Valdave Warrender be and they are hereby appointed trustees of the compound settlement in the title hereof mentioned for the purposes of the Settled Land Acts, 1882 to 1890."

The land, the subject of the contract, was purchased by the trustees in 1910, being conveyed to them by an indenture dated February 10, 1910, made between Macdonald Beaumont of the first part, George Ryan and Henry James Penfold of the second part, the vendor of the third part, and the trustees of the fourth part, whereby, after reciting that under and by virtue of the compound settlement made by the above-mentioned six documents certain estates situate in Ireland stood limited to uses under which the vendor was tenant for life, and after reciting the above-mentioned order of the High Court of Justice in Ireland dated February 6, 1908, and after reciting that portions of the estates comprised in the compound settlement had recently been sold, and after reciting an agreement for sale of the land for the sum of 7400*l.* 10*s.* which the vendor as such tenant for life and by virtue of such powers as aforesaid had directed the trustees to pay to the said Macdonald Beaumont out of capital moneys in their hands arising from the sale or sales aforesaid and which by virtue of the said compound settlement and the said Acts were liable to be so invested, and that the vendor had also directed that the land should be conveyed in manner thereinafter appearing, it was witnessed that the said Macdonald Beaumont thereby granted the land unto the trustees and their heirs to hold the same to the uses, upon the trusts, and subject to the powers, charges, and provisions to, upon, and subject to which, under, or by virtue of the said compound settlement the freehold lands and hereditaments comprised in and subject to the compound settlement then stood limited and settled, or as near thereto as the circumstances of the case might permit, but not so as to increase or multiply charges or powers of charging.

In addition to an abstract of Macdonald Beaumont's title to the land at Wimbledon down to the sale to the trustees in 1910, the vendor delivered an abstract of the last five of the six above-mentioned documents constituting the compound settlement, but did not abstract the will of the third Earl made in 1836.

The purchasers amongst other requisitions delivered the following:—

Requisition 1, requiring that the probate or office copy of the will of 1836 should be produced for examination with the recitals, and stating that strictly speaking the will ought to have been abstracted in chief as it appeared to form part of the compound settlement.

The vendors refused to comply with this requisition, referring to s. 3, sub-s. 3, of the Conveyancing Act, 1881, and s. 2, sub-s. 2, of the Vendor and Purchaser Act, 1874.

Requisition 10 was as follows: "Has there been any appointment by the Court in England of Major Thomson and Mr. Warrender as trustees of the compound settlement? It is submitted now that hereditaments situate in England are made subject to the compound settlement trustees of such settlement must be appointed by the English Court."

The vendors refused to comply with this requisition.

Requisition 11 was as follows: "It should be shewn that the moneys invested in the purchase of the Wimbledon Park property had been duly acquired by the trustees by a proper sale of portions of the estate subject to such settlement inasmuch as the trust for sale in favour of H. A. Bruce and F. T. Bircham is subject to such conditions. What lands were sold and when and by whom and under what trust for sale which produced the moneys for the purchase of the property?"

The vendors replied: "We do not agree. The trustees and the vendor are estopped by the deed of conveyance to the Earl of Arran and we submit that it would be no objection to the title even were it conclusively proved (which is not the case) that the sales effected to provide the purchase-money were in fact wrongful and in breach of trust. We must respectfully decline to give any of the information required (beyond saying that the sales were effected under the Land Purchase Act) and thus prevent the

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purchasers acquiring notice of undisclosed equities (if any) affecting the purchase-money."

The purchasers repeated their requisition, adding that the capital moneys might have arisen in divers ways, amongst others possibly by the exercise of the trust vested in H. A. Bruce and F. T. Bircham of the term of 500 years by the indenture of March 10, 1860, and that in such latter event the purchasers ought to be satisfied that the trust had been in all respects duly exercised.

The vendor then took out this summons for a declaration that the purchasers' requisitions had been sufficiently answered by the vendor and that a good title to the land had been shewn in accordance with the contract.

Cave, K.C., and *Sheldon*, for the vendor. The first requisition is precluded by s. 3, sub-s. 3, of the Conveyancing and Law of Property Act, 1881. In any case s. 2, sub-s. 2, of the Vendor and Purchaser Act, 1874, applies, since no doubt is thrown on the accuracy of the recital of the will contained in the disentailing assurance of 1860.

As regards requisition 10, the trustees were appointed to be trustees of the settlement, not of the land: Settled Land Act, 1882, s. 38; and the subsequent investment in the purchase of land in England did not affect their position as trustees of the settlement. By the Settled Land Act, 1882, s. 1, sub-s. 3, the Act applies to England and Ireland, and by s. 65, sub-ss. 1 and 2, in applying the Act to Ireland the Court is to be the High Court of Justice in Ireland. There is no ground, therefore, for the contention that the trustees ought to be appointed over again by an order of the English Court, and there is no authority in support of it. [They referred to *In re Maberly's Settled Estate* (1); *In re Simpson* (2); *In re Coote*. (3)]

Requisition 11 is equally untenable. The recital in the conveyance of 1910 is a complete estoppel against the vendor and the trustees, and moreover the purchasers under that conveyance or persons claiming under them having the legal estate

(1) (1887) 19 L. R. Ir. 341. (2) [1897] 1 Ch. 256.
(3) [1899] W. N. 222.

without notice would be unaffected by any equity attaching to the purchase-money: *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1); *In re Blaiberg and Abrahams.* (2)

H. Terrell, K.C., and *T. L. Wilkinson*, for the purchasers. As to the first requisition the purchasers are clearly entitled to see all the documents constituting the compound settlement. These documents are not part of the title to the land conveyed and are therefore not within s. 3, sub-s. 3, of the Conveyancing and Law of Property Act, 1881. The partial recital of the will of 1836 is insufficient, since to judge of its effect the whole document must be looked at: *In re Earl of Stamford and Warrington.* (3) It is correctly stated in Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 23, that the rule laid down by sub-s. 3 "is necessarily subject to qualification where a prior deed is incorporated by reference in an abstracted deed, e.g. where the property has been conveyed to the uses or upon the trusts of a settlement." Sect. 2, sub-s. 2, of the Vendor and Purchaser Act, 1874, is equally inapplicable. To come within that sub-section the recital or statement must be one in relation to the title to the land, whereas the recital in the deed of 1860 is not one in relation to the land contracted to be sold, and moreover the recital is the recital of the effect of a document and not of a fact: *In re Wallis and Grout's Contract* (4), where Swinfen Eady J. disapproved of the decision of Malins V.-C. in *Bolton* v. *London School Board* (5); and see Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 10; Hood and Challis on Conveyancing and Settled Land Acts, 7th ed. p. 2.

As regards requisition 10 it is submitted that the jurisdiction of the Court in Ireland was limited to land in Ireland, and that the trustees ought to be appointed by the Court in England before they can properly act as trustees for the purposes of the Acts in relation to the land in England: *In re Maberly's Settled Estate.* (6)

As to requisition 11, all the purchasers require to know is whether the recital in the conveyance of 1910 that the purchase-moneys were capital moneys in the hands of the trustees by

(1) (1883) 24 Ch. D. 720.
(2) [1899] 2 Ch. 340.
(3) [1912] 1 Ch. 343.
(4) [1906] 2 Ch. 206.
(5) (1878) 7 Ch. D. 766.
(6) 19 L. R. Ir. 341.

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virtue of the compound settlement is correct, and they are entitled to have this information. The vendor's statement in reply to this requisition, namely, that the sales were effected under the "Land Purchase Act," so far as it goes, is inconsistent with the statement in the conveyance.

Sheldon in reply. There is no inconsistency between the Irish Land Purchase Acts and the Settled Land Acts. The Irish Land Acts, 1903 and 1904, were enabling, not disenabling Acts, and persons having power to sell under those Acts comprise tenants for life under the Settled Land Acts: Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 17, and Irish Land Act, 1904 (4 Edw. 7, c. 34), s. 3; and see Cherry and Maxwell on the Irish Land Acts, 1903 and 1904, pp. 1076, 1160.

WARRINGTON J. This is a summons taken out by the vendor under a contract dated May 31, 1911, for the sale of certain freehold hereditaments at Wimbledon. The sale purports to be effected by a tenant for life selling under the Settled Land Acts. The contract contains a stipulation that the title to the lots in question shall commence with an indenture of mortgage dated April 30, 1874. The contract further contains a provision that the vendor is a tenant for life acting under the powers conferred by the Settled Land Acts, and should only be required to give the usual qualified covenants for title. The land in question had, according to the title furnished by the vendor, been purchased with capital moneys in the hands of the trustees arising under a compound settlement commencing with the will of the then Earl of Arran made in 1836 and concluding with a resettlement of the estates in 1902. Under the compound settlement the present Earl of Arran is tenant for life, and two gentlemen have been appointed trustees of the compound settlement for the purposes of the Settled Land Acts in connection with whose appointment a question arises. The abstract furnished by the vendor commenced with the stipulated root of title, the mortgage of April 30, 1874. No requisition is made with regard to the title so deduced until we come to a conveyance of February 10, 1910, of property, which included the property in question, to the uses of the compound settlement. The requisitions which have been made refer

entirely and exclusively to the title so far as it is affected by the compound settlement. The land in question was conveyed, as I have said, to the uses of the compound settlement, and it is under the uses of the compound settlement that the vendor claims to be entitled to sell as tenant for life. There is no doubt, therefore, that the compound settlement became part of the title to the land. In all such cases there is, as it were, a double title—first, the chain of title relating to the land itself down to the time when the land becomes subject to the uses of the settlement, and secondly, the chain of title relating to the uses of the settlement, which after the conveyance to those uses becomes itself part of the title to the land. To meet any possible objection arising from the fact that in the present case there was this double title, the vendor did not insist on the strict letter of the bond as regards the date fixed for the commencement of the title, but in addition to the abstract beginning with the mortgage of April 30, 1874, he furnished the purchasers with a further abstract relating to the second chain of title commencing with a disentailing deed of January 16, 1860, relating to the Arran settled estates, giving to the purchasers, therefore, a title more than fifty years old. Under that disentailing deed and a resettlement of March 10, 1860, and further disentailing deeds and resettlements the present Earl of Arran is now shewn to be tenant for life in possession. Prima facie, therefore, the person purporting to sell as tenant for life is shewn to be tenant for life and able to sell. The purchasers, however, have made various requisitions, with which I have now to deal. The first material requisition is as follows. [His Lordship referred to the first requisition, and continued:] This will, of which the purchasers require to see a copy, is a will made before the date stipulated for the commencement of the title, even if I treat the matter, in favour of the purchasers, as if it had been stipulated that the title should commence with the disentailing deed of January 16, 1860. Now the Conveyancing Act, 1881, s. 3, sub-s. 3, provides: "A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a

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power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document." On the face of it that provision appears to be a complete answer to the requisition. The will in question is a will made before the date stipulated for the commencement of the title, or, if there were no such date, before the date prescribed by law for the commencement of title. Why is the sub-section not to apply? The purchasers say because the will is not a document relating to the title to the land, but a document which is afterwards incorporated in a deed which is part of that title, namely, the conveyance of February 10, 1910, by which the land was conveyed to the uses of the compound settlement, one document constituting which is the will in question. The purchasers say that they are entitled to see the will because it forms part of the compound settlement. In my opinion this will, if it is material at all, is material only on the ground that it is part of the title to the land, and it is quite impossible to distinguish between one class of documents forming part of the title to the land and another class of such documents. The result, therefore, is that, if the will is not part of the title to the land, the purchasers are not entitled to see it, while, if it is part of the title to the land, it is a will made before the date stipulated for the commencement of the title, and sub-s. 3 of s. 3 of the Conveyancing Act, 1881, is applicable and precludes the purchasers from being entitled to production or to an abstract or copy. That sub-section therefore seems to me to be a complete answer to this requisition. Moreover there is no substance in the requisition, since the disentailing deed of 1860 contains a full recital of the will down to and including the last material limitation, namely, the estate tail limited to the eldest son of the then Earl of Arran; and I fail to see what possible reason there can be for going behind that recital at this distance of time. In my opinion, therefore, there is no substance in the requisition, and in any case the Conveyancing Act, 1881, s. 3, sub-s. 3, is a complete answer to it. [His Lordship then dealt with certain other requisitions, and, after reading requisition 10, continued:] The facts relating to this requisition are these. The lands originally settled

by the compound settlement were situate wholly in Ireland. In this state of things two gentlemen were in 1908 trustees of the final resettlement of 1902 but not trustees of the compound settlement. An application on the part of the tenant for life was accordingly made to the High Court in Ireland for the appointment of trustees of the compound settlement. An order was made on February 6, 1908, entitled in the matter of the Earl of Arran's estates in Ireland and settled as to part thereof by the six documents beginning with the will of 1836 and ending with the resettlement of 1902, and as to the remainder thereof by the resettlement of March 10, 1860, and the deeds of 1864, 1900, and 1902. These four deeds were four of the six documents constituting the compound settlement relating to the bulk of the estates, and comprised additional lands brought into the settlement by the resettlement of March 10, 1860, and not comprised in the will of 1836 or the disentailing deed of January 16, 1860. But the limitations and the remainders are the same in both cases. On that application the following order was made. [His Lordship read the order, and continued :] The next material fact is that the land which is the subject of the contract is land in England, purchased with capital moneys arising under the Settled Land Acts; and it is said that, because this land in England has become subject to the settlement, trustees for the purposes of the Settled Land Acts must be appointed also by the High Court in England. Is that contention well founded? The Settled Land Acts apply to Ireland, though as regards Ireland and in their application to Ireland special provision is made. The only material provision is that contained in s. 65, sub-s. 2, of the Settled Land Act, 1882, which provides that in the application of the Act to Ireland "the Court shall be Her Majesty's High Court of Justice in Ireland." No question arises in the present case such as might have arisen if at the date of the order the settlement itself had comprised lands partly in Ireland and partly in England, and nothing which I say is intended to affect that question. As a matter of fact all the land then comprised in the settlement was land situate in Ireland, and the Irish Court was the proper Court for the purposes of the Settled Land Acts. That Court being a Court of competent jurisdiction appointed these two gentlemen

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trustees for the purposes of the Settled Land Acts. The whole question is one of status. The two trustees held the position of trustees for the purposes of the Acts; and I can find no authority for the proposition which the purchasers must advance, namely, that, whenever land in England is purchased for purposes of investment out of moneys subject to an Irish settlement, a fresh appointment in England of trustees of the settlement is necessary. In my opinion that proposition is based on an entire misconception of the position of the trustees. They are not trustees of the land, but trustees for the purposes of the Settled Land Acts, and in that capacity they can give a good discharge for the purchase-moneys arising from a sale of lands subject to the settlement. In my opinion, therefore, this requisition also is ill founded. [His Lordship then read requisition 11, and continued:] The vendor says that he does not agree, but states that the sales were effected under the Irish Land Purchase Act. To deal with one point which at first impressed me; I thought at first that the reference by the vendor to the Irish Land Purchase Acts might possibly amount in itself to an admission that the moneys were not capital moneys arising under the Settled Land Acts, but I do not think that this is the true view. A sale may be made under the Irish Land Act, 1903, and yet the money may be capital money arising under the Settled Land Acts. Pressed to its fullest extent the requisition would impose on a vendor selling land purchased as an investment under the Settled Land Acts a burden which any Court would be reluctant to throw on a vendor if it could avoid it. Land ex hypothesi has been duly conveyed to the uses of the settlement, and the vendor is asked to state what particular land was previously sold to produce the purchase-money and when and by whom that land was sold. It would, in my opinion, be a monstrous burden upon the vendor if he had to answer such an inquiry, and it is also one which is perfectly unnecessary to answer in the interests of the purchaser. The conveyance of February 10, 1910, contains a clean conveyance of the legal estate in fee simple to the uses of the compound settlement, and this legal estate is under the provisions of the Settled Land Acts capable of being conveyed by the tenant for life in possession under that settlement. What

more can the purchasers require? They say, "You must prove the truth of the statement in the conveyance that the purchase-money was paid out of capital moneys in the hands of the trustees arising from sales which by virtue of the compound settlement and of the Settled Land Acts were liable to be invested in land." The answer to that is that the money was paid by the trustees; it was money in their hands; prima facie it was properly applied, and money is not affected with a trust in the absence of notice. In the conveyance itself the trustees state that the purchase-money was money liable to be laid out in the purchase of land to be conveyed to the uses of the settlement; they provide and pay the money to their then vendor, and the land is conveyed to the uses of the settlement. In my opinion the statement that the purchase-money was liable to be laid out in the purchase of land and the conveyance of the land to the uses of the settlement constitute proof enough that the purchase-money was money subject to that obligation. The requisition is sufficiently answered because the conveyance of 1910 supplies the purchasers with all the information which they can properly require; and because owing to the fact that the legal estate was conveyed to the uses of the settlement they will acquire the legal title without notice of any equities affecting the purchase-moneys if any such there be.

[His Lordship ultimately made a declaration that subject and without prejudice to a proper answer being given to one of the other requisitions the requisitions and objections of the purchasers had been sufficiently answered, and that a good title in accordance with the conditions of sale had been shewn.]

Solicitors for the vendor: *Bircham & Co.*
Solicitors for the purchasers: *Stock & Slater.*

A. C.

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April 29.

LAWSON *v.* THE GUARDIANS OF THE UNION OF MARLBOROUGH.

[1911 L. 2403.]

Poor Law Officer — District Medical Officer — Public Vaccinator — Poor Law Officers' Superannuation Act, 1896 (59 & 60 *Vict. c.* 50), *ss.* 2, 3, 4, 19— "*Officer or servant*" — *Salary or Wages and Emoluments — Vaccination Acts*, 1853 (16 & 17 *Vict. c.* 100), *s.* 6; 1867 (30 & 31 *Vict. c.* 84), *ss.* 4, 6, 7.

A public vaccinator appointed by a board of guardians under the Vaccination Acts is not "an officer or servant in the service or employment" of the guardians within the meaning of the Poor Law Officers' Superannuation Act, 1896, but is a contractor who has contracted with them for the performance of certain work for certain fees. A district medical officer who is also a public vaccinator is not entitled to bring in his fees for vaccinations as part of the "salary and emoluments" upon which the superannuation allowance to which he is entitled under that Act is calculated.

This action was brought by the plaintiff, who had been medical district officer of the guardians of the poor of the Marlborough Union and had become incapable from ill-health of discharging with efficiency the duties of his office, against the guardians for a declaration that he was entitled to a superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, an inquiry as to the proper amount of such an allowance, and an order for its payment. The guardians had originally disputed the plaintiff's right to any superannuation allowance, but by their defence they admitted that he was entitled to such an allowance, and the point in dispute was whether for the purpose of calculating the amount of such an allowance the plaintiff was entitled to bring in as part of his "salary or wages and emoluments" the fees paid to him as public vaccinator for vaccinations. The sections of the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), on which the question turned are set out below. (1)

(1) "1. This Act may be cited as the Poor Law Officers' Superannuation Act, 1896, and shall come into operation from and immediately after the twenty-ninth day of September one thousand eight hundred and ninety-six.

"2. Subject to the provisions of this Act, every officer and servant in the service or employment of the

The plaintiff had purchased the practice of a deceased doctor who had been district medical officer and public vaccinator for the district of Avebury within the defendants' union. The guardians issued an advertisement of their intention to proceed to the appointment of a medical officer and public vaccinator for this district at their meeting on March 21, 1908, and invited applications. The

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guardians of a union or parish who shall become incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body, or of old age, or who shall have attained the age of sixty years and have completed an aggregate service of forty years, or who shall have attained the full age of sixty-five years, shall be entitled on resigning or otherwise ceasing to hold his office or employment, to receive during life out of the common fund of the union, a superannuation allowance according to the scale laid down in this Act.

"An officer or servant shall not be entitled to an allowance on the ground of old age unless he has completed the full age of sixty years.

"Where an officer or servant has attained the age of sixty-five years and the guardians are of opinion that it would be expedient in the interests of the public service that he should cease to hold his office or employment, it shall be competent for them to require him to retire upon payment to him of the superannuation allowance to which he may be entitled under this Act.

"3. The scale for superannuation allowances under this Act shall be as follows, that is to say:—

"An officer or servant who has served for ten years but less than eleven years shall be entitled to an annual allowance equal to ten-sixtieths of the average amount of his salary or wages and emoluments during the five years ending on the quarter day which immediately precedes the day on which he ceases to hold his office or employment,

"With an addition of one-sixtieth of such average amount for every additional completed year of service until the completion of a period of service of forty years, when a maximum allowance of forty-sixtieths shall be granted.

"4. All service by an officer or servant under any authority or authorities to whom this Act applies shall be aggregated and reckoned for the purposes of this Act, whether the service has been continuous or not, and whether his whole time has been devoted to the service or not."

Sect. 12 provided for contributions to be paid by the officers by way of deduction from their salaries.

Sect. 19 contained the following definition:—

"'Officer' includes every officer in the service of an authority to whom this Act applies whether his whole time is devoted to the duties of his office or not; and for the purposes of this Act superintendent registrars and registrars of births and deaths and school attendance officers are deemed to be in the service of the guardians of the union in which their districts are situated:"

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plaintiff applied for both posts. The guardians at their meeting on March 21 passed a formal resolution appointing the plaintiff district medical officer at a salary of 100*l.* a year subject to the approval of the Local Government Board. On April 18 a formal agreement was executed by the plaintiff and the guardians whereby, after a recital that the guardians had appointed the plaintiff to be medical officer, the plaintiff covenanted with the guardians to perform the duties of that office, and that if he desired to resign he would give the guardians one month's notice or forfeit a month's salary, which might be deducted from his salary as liquidated damages, unless the guardians accepted a shorter notice; and the guardians covenanted to pay him his salary of 100*l.* and to pay extra fees for certain special cases or medicines. On the same day articles of agreement were executed by the guardians and the plaintiff whereby, after a recital that the guardians had with the approval of the Local Government Board divided their union into districts for the purposes of vaccination, one of which was the Avebury district, and had agreed with the plaintiff to enter into a contract for the performance of vaccinations in the said district, the plaintiff covenanted with the guardians to perform specified vaccinations and give specified medical attention to vaccinated persons, and to perform any other duties in regard to vaccination which might be imposed upon him by the Vaccination Acts, 1867 to 1898, or by any rules or regulations of the Local Government Board under those Acts, and the guardians covenanted to pay him specified fees for each vaccination. There was no resolution appointing him public vaccinator.

The plaintiff continued to act as district medical officer and public vaccinator until September 27, 1911, when he wrote to the board resigning the post of medical officer on the ground of inability to perform the duties efficiently through bodily infirmity. He had previously applied for a superannuation allowance, but had been informed that the board could not consider this question until he formally resigned. On September 30 the board passed a resolution accepting his resignation, but stating that they did not consider he was entitled to any superannuation allowance. This resolution was communicated to the plaintiff on October 2.

There was some dispute between the parties as to the date on which the plaintiff ceased to hold office, but on the suggestion of the judge both parties admitted that he ceased to hold office on September 29, to which date his salary had been paid.

The plaintiff had served as district medical officer in other places before his appointment to Marlborough, and the total poor law service which he was entitled to have aggregated for the purpose of calculating his superannuation allowance under s. 4 of the Superannuation Act was twenty-six years and some weeks.

During his time at Marlborough the statutory deductions had been regularly made from his salary and fees as medical officer, but no deduction had been made from his vaccination fees. It was stated that the Local Government Board had for a long time held, and acted upon, the opinion that a district medical officer who was also public vaccinator was not entitled to take into account his vaccination fees in calculating the amount of his superannuation allowance.

Hon. M. M. Macnaghten, for the plaintiff. A public vaccinator is clearly within the definition of "officer" in s. 19 of the Poor Law Officers' Superannuation Act, 1896. He is appointed by the guardians and paid by them and his duties are defined by a contract entered into with them. The Vaccination Act of 1867 (30 & 31 Vict. c. 84), s. 4, speaks of the appointment of a public vaccinator, and that Act requires that any contract with him must be approved by the Local Government Board. In this case the two posts were treated as one, for the plaintiff's resignation only referred in terms to the office of district medical officer, but both parties treated it as applying to both offices, and in this case the emoluments must be treated as all belonging to one office. But the guardians were not bound to appoint the same person to both offices, and if they had appointed a man to be public vaccinator only, it could not be contended that he was not their officer. If deductions which ought to have been made have been omitted they can be deducted from the amount payable; the omission cannot estop the plaintiff from claiming his allowance.

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Herbert Davey and *Whitfield-Hayes*, for the defendants. A public vaccinator is not a poor law officer at all; vaccination is not in any sense a part of the relief of the poor. The Poor Law Officers' Superannuation Act, 1896, repeals and consolidates certain former Acts which empowered the guardians to grant superannuation allowances in certain cases, but gave no right to the officers to claim them. The first of these, the Superannuation Act of 1864 (27 & 28 Vict. c. 42), defines officer as "officer engaged in relief of the poor," and this governs the whole series of Acts up to that of 1896. That Act was only intended to give a right to the allowance to every one who might have received it before, and was not intended to apply to any one else, unless specially named. Superintendent registrars, registrars of births and deaths, and school attendance officers are appointed by the guardians under Acts which are not Poor Law Acts, and therefore they are specially named. District medical officers date from the General Poor Law Order of 1847 and their appointment and duties are regulated throughout by Poor Law Acts and Orders. They can only be dismissed by the Local Government Board. The Vaccination Act of 1853 first enabled boards of guardians to contract with their own medical officers, or other qualified medical men, to perform vaccinations for fees, and all through the Vaccination Acts that form is adhered to; the relation between the board and the public vaccinator is contractual only, not that of employer and officer or servant. That is the effect of the contract in the present case, which has been, as it must be, approved by the Local Government Board. The only place in the whole series of the Vaccination Acts where the public vaccinator is spoken of as "appointed" is s. 4 of the Act of 1867, and that section deals with the qualifications required, so it is natural to use the word "appointed." The distinction between "a contract of service" and "a contract personally to execute any work" was made in the Employers and Workmen Act, 1875, s. 10, and is explained in the judgment of Lopes J. in *Grainger* v. *Aynsley*. (1)

Hon. M. M. Macnaghten in reply.

(1) (1880) 6 Q. B. D. 182.

NEVILLE J. The question as to the period during which the average is to be calculated upon which the superannuation fund is fixed has been agreed between the parties, and therefore I need not deal with it any further. The fact that Dr. Lawson was entitled to superannuation is no longer in dispute if ever it was, and the matter that I have to determine is narrowed down to a question which is no doubt of general importance, and no doubt of importance to Dr. Lawson himself in the present case. That question is whether a vaccination officer appointed under the Vaccination Acts is entitled to superannuation, or to have his superannuation calculated in accordance with the provisions of the Act of 1896. That, it appears to me, depends on whether a public vaccinator can be said to be an officer in the employment of the guardians of the union or parish, that is the body that we have to deal with in the present case. Now the words in the statutes under which the public vaccinators have been appointed are peculiar and I think unusual. The question that I have to determine is what they mean. As I understand it, the Local Government Board have acted upon a particular view of the proper construction of the statutes for a considerable time, and the question is whether they are right. I do not think that I am entitled to take into consideration what their view of the construction is, because when the question of the construction of a statute is brought before the Court, and there is no authoritative decision which the Court can follow, the Court must make up its mind without the assistance of the opinion of others as to what the real meaning of the statute is; and I am glad to say, because it would involve considerable difficulty and in some cases injustice, if the Local Government Board have been acting upon what the Courts hold to be an erroneous view of the statute, that I have come to the conclusion that their view of the construction of the Superannuation Act is correct. I think what one has to consider is what is the meaning of the words which have been persistently used throughout all the Vaccination Acts as far as I have been able to refer to them. In every case the words used are that the guardians may contract with the medical officers of their several unions or with any duly qualified medical practitioner for the vaccination of all persons

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resident in the unions or parishes. The practice has been, and was in this case, in accordance with the Acts, that contracts have always been entered into with a duly qualified medical practitioner to perform vaccination under the Vaccination Acts. It appears to me that those words are used with intention, and that it was thereby intended to provide that the service should be rendered as a contractual service in the ordinary sense, and should not make the public vaccinator an officer of the guardians of the union or parish on whom the duty lay of entering into a contract with him for the vaccination of the people resident in the district. I think that the terms of the contract are in accordance with the Act, and they shew clearly that it is merely a contract on the one hand for a professional man to perform services in return for certain fees to be paid by the guardians. I think that that is the contract, and that it does not make him the officer of the guardians. In my opinion, therefore, in that respect the plaintiff fails in this case, but he is entitled to his superannuation as district medical officer calculated in a way as to which there is no dispute for the five years previous to June 30, 1911.

Solicitors: *Mills & Morley; Merrimans & Thirlby, for Merrimans & Gwillim, Marlborough.*

J. R. B.

In re FOSS, BILBROUGH, PLASKITT & FOSS.

NEVILLE J.

1912

April 22; May 7.

[1911 F. 1518.]

Solicitor—Costs—Taxation—Bill of Costs delivered to Company—Voluntary Winding-up—Payment—Retainer of Amount—Delivery Twelve Months before Summons for Taxation.

If a solicitor's bill of costs due from a limited company be delivered less than twelve months before the company is wound up it can be taxed at any time during the winding-up. Retainer by the solicitor of his costs out of moneys in his hands belonging to the client is not payment within the meaning of s. 41 of the Solicitors Act, 1843, unless there has been a settlement of account between the parties.

Taxation of costs in a winding-up whether voluntary or compulsory ought not to be made under the Solicitors Act, 1843, but under the general jurisdiction of the Court. It is ordered only as a means of ascertaining the amount of the solicitor's claim against the assets. The form should be that generally adopted in windings-up by the Court, in which there is no submission to pay, and as a rule the solicitor is allowed to add the costs of taxation to his claim.

THIS was a summons taken out by the liquidator of La Martona Rubber Estates, Limited, in a voluntary winding-up, for the taxation of three bills of costs delivered to the company by their solicitors; the solicitors objected that the first of the bills had been delivered more than a year before the summons, and the first and second had been paid; they did not object to the taxation of the third bill. The first bill was for 81*l.* 2*s.* 2*d.* and was delivered to the company on July 1, 1910; the second was for 574*l.* 10*s.* 6*d.* and was delivered to the company on May 18, 1911; the third was for 585*l.* 9*s.* 4*d.* and was delivered to the liquidator on July 28, 1911.

A special resolution for the voluntary winding up of the company was passed on May 18, 1911, and confirmed on June 8, 1911, and by the same resolution a liquidator was appointed. The summons was taken out on November 17, 1911. All the bills, therefore, had been delivered within twelve months before the date of the liquidation, but the first bill had been delivered more than twelve months before the summons.

It appeared that the company had paid to the solicitors money

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in advance for costs, and the solicitors had delivered cash accounts on May 18, 1911, and July 28, 1911. The first account credited the company with the sums advanced by the company and debited them with the first two bills of costs, leaving 401*l.* 17*s.* 4*d.* to the credit of the company; the second credited the company with the said sum of 401*l.* 17*s.* 4*d.* and certain other sums amounting in all to 408*l.* 5*s.* 1*d.* and debited them with the third bill of costs, shewing a balance to the debit of the company of 177*l.* 4*s.* 3*d.* It was alleged by the solicitors that the company had consented to their retaining these sums in discharge of their bills of costs, and as a fact no objection was taken by the company before the winding-up to the cash account delivered on May 18, 1911; but the judge held on the evidence that the solicitors had not proved any consent to the retainer or agreement as to the amount of the costs.

E. G. Palmer, for the summons. The rule that taxation must be applied for within twelve months of the delivery of the bill does not apply when there is a winding-up, unless the twelve months have elapsed before its commencement: *In re Marseilles Extension Railway and Land Co.* (1); *In re Liverpool Household Stores Association.* (2) In the last case Kekewich J. said that it was not the practice in the case of a winding-up to make the order to tax under the Solicitors Act, 1843, but the solicitor carries in his bill of costs as a claim, and if it is disputed it is taxed in the usual way and the solicitor adds the costs of taxation to his claim. But in *In re Brabant* (3) the order was made under the Solicitors Act, and it is submitted that that is the usual practice, but if it is not so, *In re Park* (4) shews that the Court will direct taxation under its general jurisdiction though twelve months have elapsed. Such a retainer of money as took place in this case is not payment: *In re West, King & Adams.* (5)

H. E. Wright, for the solicitors. If this were an application under the Solicitors Act, 1843, it must fail because there has been payment. *Hitchcock* v. *Stretton* (6), where Stirling J. reviewed

(1) (1870) L. R. 11 Eq. 151.
(2) [1889] W. N. 48.
(3) (1879) 23 Sol. J. 779.
(4) (1889) 41 Ch. D. 326.
(5) [1892] 2 Q. B. 102.
(6) [1892] 2 Ch. 343.

all the cases, shews that where there has been a proper bill with items delivered retainer is payment. In *In re West, King & Adams* (1) no bill had been delivered. After payment taxation cannot be ordered unless there is gross overcharge. The only overcharge suggested here is that the usual fee was charged for the issue of each of a number of writs when the subject-matter of all the actions was the same. *Price* v. *Clinton* (2) is a clear authority that that is not an overcharge.

But this application cannot be made under the Solicitors Act, 1843. The matter is clearly put in the argument of Cotton, Q.C., in *In re Marseilles Extension Railway and Land Co.* (3) In a winding-up a solicitor's claim is "to prove as a creditor of the company for a debt. The liquidator must investigate the claim, and see what items in it are proper to be charged, and the easiest mode of doing so is by a reference to the taxing Master." In Palmer's Company Precedents, pt. ii., Winding up, 10th ed. p. 368, it is stated that the order is made on summons in the liquidation; the liquidator does not give any undertaking to pay and usually is allowed to add his costs of taxation to his claim. I admit that taxation may be ordered under the general jurisdiction of the Court where the solicitor claims to prove. That is decided by *In re Park*. (4) But the first two bills have been paid by retainer, and the retainer, whether proper or improper, prevents the solicitor making any claim and there is nothing for the liquidator to examine. In *In re James* (5) taxation of a bill, delivered and partly paid before the winding-up, was refused. The solicitors do not oppose the taxation of the third bill under the general jurisdiction, but it must not be under the Solicitors Act.

May 7. NEVILLE J. The liquidator of the company seeks an order for taxation of three bills of costs, two of which were delivered by the company's solicitors before the winding-up, and the last subsequently. It is not disputed that he is entitled to tax the bill last delivered either under the Solicitors Act of 1843

(1) [1892] 2 Q. B. 102.
(2) [1906] 2 Ch. 487.
(3) L. R. 11 Eq. 151, 153.
(4) 41 Ch. D. 326.
(5) (1850) 4 De G. & Sm. 183.

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or under the general jurisdiction of the Court, but objection is taken to taxation of the first and second bills on the ground first of payment, and secondly that more than a year has passed since delivery of the first of these bills. In my opinion the solicitors have failed to establish payment. The company advanced sums from time to time to the solicitors on account of costs which were credited to the company in the cash accounts in which they were debited with, amongst other items, the amount of these three bills of costs, the accounts shewing an ultimate balance of 177*l.* 4*s.* 3*d.*, or thereabouts, against the company. In my opinion where clients have advanced moneys on account of costs prior to the delivery of a bill and the solicitors subsequently deliver a bill and appropriate the money of the clients in their hands in payment, this does not amount to payment of the bill within s. 41 of the Act of 1843, at all events where there has been no settlement of account. In my opinion there was no such settlement in the present case. I think, therefore, there was no payment here. I have to consider next whether a year has elapsed since the delivery of the bills. If the material date is the date of the winding-up of the company, the year has not elapsed; if it is the date of the issue of the liquidator's summons, it has elapsed in the case of the first bill. I think this point was determined by Malins V.-C. in *In re Marseilles Extension Railway and Land Co.* (1), and that the date of the winding-up was the material date.

The next question is whether the liquidator comes within the provisions of the Act of 1843 at all, or whether the orders made for taxation in a liquidation are independent of the Act.

The authorities on this point are not very satisfactory. Malins V.-C., in the case above referred to, distinctly held that the Act applied. In *In re James* (2) the official manager obtained an order under the Solicitors Act for taxation of a bill delivered after the winding-up order, but was refused an order in respect of a bill delivered more than twelve months before the commencement of the winding-up, Knight Bruce V.-C. saying that he was prevented by the Act from directing taxation except under special circumstances, and that if he was entitled to look at the special

(1) L. R. 11 Eq. 151. (2) 4 De G. & Sm. 183.

circumstances of the case he did not think it a right application of the law to direct the bill to be taxed. In *In re Liverpool Household Stores Association* (1) Kekewich J. says that the official liquidator was not entitled to have his costs taxed under the Solicitors Act, 1843, and declared the settled practice to be that the solicitor carried in his bill as a claim, and if the amount was disputed the bill was taxed in the ordinary way and the solicitor added the costs of taxation to his bill and received a dividend upon the amount. In *In re Brabant* (2) Sir George Jessel M.R. said that it was not the practice in the case of a company in liquidation to grant the common order to tax, making the liquidator offer to pay what should be found due. In all cases where there was a liquidation a special order was granted containing no offer to pay. The solicitor usually had liberty to add the costs of taxation to his bill with liberty to prove in the winding-up for the amount. In this connection it may be mentioned that the practice of demanding a submission to pay obtains in the Chancery Division, but not in the King's Bench Division, no such obligation being imposed by the Act: see Cordery on Solicitors, 3rd ed. p. 311. In *In re Park* (3) Stirling J. points out that in cases not within the Solicitors Act costs may always in proper cases be taxed under the general jurisdiction of the Court, and that taxation is the course adopted where a solicitor sues for his costs and the amount has not been settled or where a claim is made in any administration in equity.

I have ascertained that the order in *In re Brabant* (2) was made under the Solicitors Act, but the practice at present is stated to be that in a winding-up by the Court an order is not made under the Solicitors Act, *In re Liverpool Household Stores Association* (1) being followed; while in a voluntary liquidation the company petitions under the Solicitors Act. There is some difficulty in treating the case of *In re Brabant* (2) as properly decided under the Act for this reason. In the Act of 1843 the costs are directed to follow the event, i.e., the taxing off or not taxing off one-sixth of the bill, and no discretion appears to be

(1) [1889] W. N. 48. (2) 23 Sol. J. 779.
(3) 41 Ch. D. 326.

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given to the Court unless the order is made under special circumstances. I cannot myself see any sufficient ground for the adoption of a different practice in this regard in the cases of compulsory and voluntary liquidation. A practice has been adopted in compulsory windings-up, which appears to be in accordance with justice, of making the order as a means of ascertaining the amount of the solicitor's claim against the assets, and as a general rule allowing the solicitor to add the costs of taxation to his claim. I think the same practice should be followed in a voluntary winding-up. In the present case, in my opinion, the liquidator has a right against the solicitor to claim an account, and the solicitor a right to prove for the amount of his costs, and what may be ultimately due from one to the other cannot be properly ascertained without taxation. I direct the bills to be taxed by the taxing Master, but make no order as to the costs of the adjournment into Court, both parties having succeeded in part and failed in part of their contention. Subject to this the costs of the taxation will be added to the amount found to be due to the solicitors on the bills. The liquidator will be entitled to his costs out of the assets.

Solicitors: *Mills, Curry & Gaskell; Foss, Bilbrough, Plaskitt & Foss.*

J. R. B.

In re ORPHAN WORKING SCHOOL AND ALEXANDRA ORPHANAGE'S CONTRACT.

PARKER J.

1911

Dec. 8, 12

1912

May 3.

[1911 O. 724.]

Charity—Endowment—Sale of Land—Consent of Charity Commissioners—Voluntary Subscriptions — Mixed Charity — Trust Deed — Implied Authority to settle Trusts for General Purposes—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

A charity was formed in 1758 and was supported by the donations, legacies, and subscriptions of benevolent persons. In 1771 it contemplated building a new school in London and, through a committee, collected subscriptions for the purchase of land as the site of the school, and for the building of the school, which was used by the charity until 1848, when a school in another locality was built and thenceforth used in lieu of the London school. The site for the London school and the building of that school were paid for partly by the subscriptions given for that purpose, and partly, to at least an equal extent, out of the ordinary subscriptions to the charity which could be used for the general purposes of the society. The committee had the land conveyed to trustees upon trust for and for the only use, benefit, and service of the charity, "and to be conveyed and disposed of, from time to time, in such manner as should be ordered and directed for that purpose at any general court or meeting of the subscribers to the said charity for the time being." There was no evidence as to whether the donors of the subscriptions to the school fund had or had not authorized a conveyance upon these trusts. By an Act passed in 1848 the charity was incorporated, with power to hold land and for the purposes of the institution to convey and dispose of such land. In 1905 this power of disposition was taken away by an Act which amalgamated the charity with other charities under a different name, and gave the newly incorporated body power to sell its land, but provided (s. 13) that this power should "as regards property . . . . forming an endowment for charitable purposes (other than educational), and not exempted from the jurisdiction or control of the Charity Commissioners . . . . or the powers or provisions of the Charitable Trusts Acts, 1853 to 1894, by such Acts or otherwise, be exerciseable with the consent of the said Commissioners, and, as regards property forming an endowment for educational purposes, and not exempted under the Charitable Trusts Acts, 1853 to 1894, and the Endowed Schools Acts, 1869 to 1889, or otherwise, with the consent of the Board of Education."

The charity having contracted to sell land forming the site of the London school, the purchasers raised the question whether the consent,

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either of the Charity Commissioners or of the Board of Education, was required:—

Held, (1.) that the meaning of s. 13 of the Act of 1905 was that where, but for that Act, the consent of the Charity Commissioners or of the Board of Education would be necessary, it was still to be necessary notwithstanding the power of sale previously given; (2.) that the charity was not within the exemptions from the control of the Charity Commissioners or the Board of Education given by s. 66 of the Charitable Trusts Act, 1853, as a society "wholly maintained by voluntary contribution"; (3.) that the charity was within the exemptions of s. 66 of the Act of 1853 so far as it was maintained by voluntary subscriptions; (4.) that, applying the principle of *Attorney-General* v. *Mathieson* [1907] 2 Ch. 383, the committee must, in the absence of evidence, be assumed to have had the authority of the subscribers to the building fund to declare trusts for the general purposes of the charity; and (5.) that the land contracted to be sold was a donation to a mixed charity of which no special application or appropriation had been directed or declared by the donor, and which might legally be applied by the charity as income in aid of the voluntary subscriptions, and therefore was, by s. 66 of the Act of 1853, exempted from the control of the Charity Commissioners and the Board of Education.

The expressions "voluntary contributions" and "endowment" defined.

THE Orphan Working School and Alexandra Orphanage (below called "the vendors") on January 3, 1911, contracted to sell to the State of San Paulo (Brazil) Pure Coffee Company, Limited (below called "the purchasers"), certain freehold hereditaments situate in the City Road, in the parish of St. Luke's, Old Street, in the borough of Finsbury.

The purchasers took out a summons under the Vendor and Purchaser Act, 1874, asking, amongst other things, for a declaration that the vendors had not shewn that it was unnecessary for them to obtain the consent of the Charity Commissioners for England and Wales, or the Board of Education (whichever might be the proper authority), to the sale of the property; that a requisition on this point had not been sufficiently answered; and that a good title to the property had not been shewn.

By an Act (11 & 12 Vict. c. cx.) intituled "An Act to incorporate the members of the institution called 'The Orphan Working School' now established at Haverstock Hill, Hampstead Road, in the county of Middlesex, and to enable them the better to carry on their charitable designs," it was recited that in 1758 the

institution called the Orphan Working School was formed at Hoxton, for the maintenance, instruction, and employment of orphans and other necessitous children, which in 1773 was removed to the City Road, but had recently been removed to Haverstock Hill; and that the charity had theretofore been and was then conducted on a plan agreed upon by the members thereof (set forth in the Act), and that "the said institution has heretofore been and is now supported by the donations, legacies, and subscriptions of benevolent persons."

The evidence shewed that in 1771 the institution purchased freehold lands (including the property now in question) in the City Road, and that on the site so purchased the school was erected. The land so acquired was paid for in the following manner. "The institution asked for subscriptions for that purpose, but quite as much money was contributed out of the ordinary subscriptions, which could be used as the institution liked. After the land had been purchased the committee which collected the money had it conveyed to be held for the purposes referred to in the Act of 1848, which recited that by a deed dated in 1840 the City Road property had been conveyed to a certain person and his heirs "to the only proper use and behoof of" certain persons "their heirs and assigns for ever, upon trust nevertheless for and for the only use, benefit, and service of the said charity called 'The Orphan Working School,' and to be conveyed and disposed of from time to time in such manner as should be ordered and directed for that purpose at any general court or meeting of the subscribers to the said charity for the time being, and to or for no other use, trust, intent, or purpose whatsoever."

By s. 1 of the Act of 1848 it was enacted that the president, vice-presidents, treasurer, and governors for the time being of the institution should be incorporated by the name of "the President, Vice-Presidents, Treasurer, and Governors of the Orphan Working School," and by that name should be a body with perpetual succession and a common seal.

By s. 3 of the same Act the corporation was empowered to hold the properties at Haverstock Hill and the City Road and a limited quantity of other land "for the purposes of the

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institution," and also "for the purposes of the institution to convey and dispose from time to time" of such properties and land, provided that nothing in the Act should make valid any grant or disposition which would not be valid under the Act 9 Geo. 2, c. 36.

The section giving this power of disposition was repealed by s. 14 of the Orphan Working School and Alexandra Orphanage Act, 1905 (5 Edw. 7, c. xxii.), which Act confirmed an amalgamation and consolidation of the Orphan Working School and two institutions called the Alexandra Orphanage for Infants and the Convalescent Seaside Home, and provided that the president, vice-presidents, treasurer, and governors of the former should be called "the Orphan Working School and Alexandra Orphanage" with all the powers conferred upon them by the Act of 1848, as amended by the Act of 1905, for the purpose of the control and administration as one combined institution of the three institutions; and that the Act of 1848, as amended by and subject to the provisions of the Act of 1905, should apply to the Orphan Working School and Alexandra Orphanage accordingly.

The Act of 1905 also contained the following provisions:—

Sect. 11. "The Orphan Working School and Alexandra Orphanage may from time to time sell, mortgage, charge, exchange or otherwise dispose of the lands and tenements . . . . or any part thereof now or by this Act vested in them . . . . and may do and execute all such acts, matters, and things as may be necessary for effectuating and completing any such sale, mortgage, charge, exchange or disposition. Provided always that the moneys to arise from any such sale, mortgage, charge, exchange or otherwise as aforesaid shall be applied by the said corporate body for the establishment, improvement, support and maintenance of the Orphan Working School and Alexandra Orphanage, the payment and discharge of the liabilities existing immediately before the passing of this Act in respect of the Orphan Working School, the Alexandra Orphanage Trust, and the Convalescent Seaside Home, or any of them, and generally for the purposes of the Act of 1848 as amended by this Act."

Sect. 12. "The Orphan Working School and Alexandra Orphanage may demise all or any part of the lands and hereditaments for the time being vested in them for any term of years

and upon such terms and conditions and subject to such covenants and provisions as the said corporate body think fit."

Sect. 13. "The powers conferred by the sections of this Act of which the marginal notes are 'Power to mortgage, sell, &c., lands, &c.,' and 'Power to lease,'" [namely, ss. 11 and 12] "shall, as regards property of the Orphan Working School and Alexandra Orphanage forming an endowment for charitable purposes (other than educational), and not exempted from the jurisdiction or control of the Charity Commissioners for England and Wales or the powers or provisions of the Charitable Trusts Acts, 1853 to 1894, by such Acts or otherwise, be exerciseable with the consent of the said Commissioners, and, as regards property forming an endowment for educational purposes, and not exempted under the Charitable Trusts Acts, 1853 to 1894, the Endowed Schools Acts, 1869 to 1889, or otherwise, with the consent of the Board of Education."

Neither the Charity Commissioners nor the Board of Education, who had both been consulted on the point, claimed any right to assent to the sale.

The vendors' solicitors received from the Treasury Solicitor a letter stating that "in the circumstances of the case the Attorney-General does not propose to take or intervene in any proceedings to establish, or to contend, that the land in the City Road which appears to have been acquired on behalf of the charity in 1771 cannot be disposed of without the consent of the Board of Education."

The summons was adjourned into Court and heard on December 8 and 12, 1911, and May 3, 1912.

Romer, K.C., and *Vanneck*, for the purchasers. We want a declaration that the vendors cannot make a good title to sell without the consent either of the Charity Commissioners or of the Board of Education to the sale. Sect. 11 of the Act of 1905 gives the charity a power of sale, but s. 13 of the same Act imposes restrictions on the exercise of the power, and provides that where the property to be sold forms "an endowment for charitable purposes" the power shall only be exercisable with the consent of the Charity Commissioners, and that where the

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property forms "an endowment for educational purposes" the power shall only be exercisable with the consent of the Board of Education—except, in either case, where the property is exempted from the control of the Commissioners or the Board, as the case may be. Unless such an exemption is shewn—and our contention is that it cannot be shewn—the consent either of the Commissioners or of the Board must be obtained before the vendors can make a good title. Under s. 3 of the Act of 1848 the charity incorporated by that Act had power to convey and dispose of land held for the purposes of the institution, but that unrestricted power of disposition was taken away by s. 14 of the Act of 1905.

In considering whether the land contracted to be sold is an "endowment for charitable purposes" or an "endowment for educational purposes" one has to inquire as to the origin of the funds out of which the land in the City Road (of which it forms part) and the school built on it were paid for. No doubt the charity obtained some of the money by subscriptions or donations given for the general purposes of the charity, but the rest of the money was given for the express purpose of being used as a school building fund, and the land purchased is therefore impressed with a trust for charitable or educational purposes. The charity called "the Orphan Working School" was formed in 1758 at Hoxton, but was not then incorporated. In 1771, it having been resolved to change the site of the school, the site of a new school in the City Road was purchased, and the fact that the land has been conveyed generally upon trust for the charity does not free it from the trusts, charitable or educational, with which the funds out of which it was bought were originally impressed. *In re Clergy Orphan Corporation* (1) is an authority in our favour on this point, that funds do not lose their character by being invested. Sect. 13 of the Act of 1905 made the assent of the Commissioners or the Board necessary if it was not required before.

[*A. Grant, K.C.* Sect. 13 was inserted ex abundanti cautela to cover something in the future.]

(1) [1894] 3 Ch. 145.

If the land is not exempted from the control of the Commissioners by the substantive enactments of the Act of 1905, it is not exempted by the Charitable Trusts Acts or otherwise. Sect. 29 of the Charitable Trusts Act, 1855, forbids a sale by a charity except "under an Act already passed or which may hereafter be passed," or by authority of the Court, or according to a scheme, or with the approval of the Charity Commissioners. Any power of sale under the Act of 1848 has been taken away, and no such authority, scheme, or approval has been obtained. The land does not come within any of the exemptions in s. 62 of the Charitable Trusts Act, 1853, which include certain universities, colleges, and halls, cathedrals and some other places of religious worship, the Commissioners of Queen Anne's Bounty, the British Museum, friendly and benefit societies, and savings banks. Nor can it be said that this charity is an "institution, establishment, or society for religious or other charitable purposes . . . . wholly maintained by voluntary contributions" within the meaning of the section. Sect. 62 proceeds to enact that "where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment" the Act shall "extend and apply to the income from endowment only," and it exempts from the Act and from the control of the Commissioners only a "donation or bequest unto or in trust for any such charity as aforesaid"—namely, a "mixed charity"—"of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions." But it cannot be said that the school building funds were not specially appropriated by the donors thereof, and they and the land in which they were invested are an endowment outside the exemptions referred to. And, moreover, the charity is one which is maintained only partly by voluntary subscriptions, and if it has an endowment in the shape of land which it occupies, then, although the endowment does not produce actual income, the land is subject to the jurisdiction of the Commissioners: *In re Stockport Ragged, Industrial, and Reformatory Schools* (1); *Attorney-General* v. *Mathieson.* (2) [They also referred to *In re*

(1) [1898] 2 Ch. 687.

(2) [1907] 2 Ch. 383.

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Society for Training Teachers of the Deaf and Whittle's Contract (1) and *In re Church Army.* (2)]

A. Grant, K.C., and *Owen Thompson*, for the vendors (called on only as to the question raised by reason of part of the subscriptions being applicable to the school building fund). The Court will assume that the committee which collected the subscriptions to the building fund had authority from the donors to declare by deed the trusts upon which the lands purchased with the money were to be held: *Attorney-General* v. *Mathieson.* (3) In *In re Church Army* (2) the society was incorporated under the Companies Acts, 1862 to 1890, and was formed for charitable purposes. Its memorandum of association gave it power to purchase and sell its real and personal property. It applied for and obtained donations for special objects including one for the completion of new headquarters of the society. With the moneys leasehold premises were acquired, and the Court of Appeal held that the subscribers to the headquarters must be taken to have known that their contributions, although primarily applicable to this particular object, were given for the general purposes of the society, that there was no intention to take the money out of the control of the managing body, and that there was no such endowment within the meaning of s. 66 of the Act of 1853 as rendered the society amenable to the jurisdiction of the Charity Commissioners. The case now before the Court is really a stronger case than that, because of the execution of a trust deed for general purposes which has existed for many years without complaint from any subscribers to the building fund.

Vanneck in reply. The decision in *In re Church Army* (2) turned on the findings of fact in that particular case.

PARKER J. By this summons, taken out under the Vendor and Purchaser Act, 1874, the purchasers in effect ask me to declare that no title has been made by the vendors to the property contracted to be sold.

The vendors are a charity called the Orphan Working School and Alexandra Orphanage, which is now incorporated

(1) [1907] 2 Ch. 486. (2) (1906) 75 L. J. (Ch.) 467.
(3) [1907] 2 Ch. 383.

under an Act of 5 Edw. 7, intituled "The Orphan Working School and Alexandra Orphanage Act, 1905." Under s. 11 of that Act the charity has a general power of sale over the land contracted to be sold, and under s. 12 it has a general power of leasing lands, including this particular property. But there is another section (s. 13) which puts a certain restriction on the exercise of those general powers, the restricting words being as follows: "The powers conferred by the sections of this Act of which the marginal notes are 'Power to mortgage, sell, &c., lands, &c.' and 'Power to lease,' shall, as regards property of the Orphan Working School and Alexandra Orphanage forming an endowment for charitable purposes (other than educational), and not exempted from the jurisdiction or control of the Charity Commissioners for England and Wales or the powers or provisions of the Charitable Trusts Acts, 1853 to 1894, by such Acts or otherwise, be exerciseable with the consent of the said Commissioners, and, as regards property forming an endowment for educational purposes, and not exempted under the Charitable Trusts Acts, 1853 to 1894, the Endowed Schools Acts, 1869 to 1889, or otherwise, with the consent of the Board of Education."

Now I think the object of s. 13 is clear. By s. 29 of the Charitable Trusts Amendment Act, 1855, a charity with a statutory power of sale may exercise that power without the consent of the body which is in the section referred to as "the Board," and which means the Charity Commissioners. Therefore, if ss. 11 and 12 of the Act of 1905 had stood alone, the jurisdiction of the Charity Commissioners, or of the Board of Education as their successors, would have been entirely ousted in connection with sales and leases. But the object of s. 13 of the Act of 1905 appears to me to be this: that if the property, in respect of which the powers, conferred by ss. 11 and 12, of sale and leasing respectively, is property not exempted from the jurisdiction of the Charity Commissioners by virtue of s. 62 of the Charitable Trusts Act, 1853, then and in that case the consent of the Commissioners, or of the Board of Education as their successors, has still to be obtained. It means, therefore, that where, but for the Act, the consent of the Charity Commissioners or Board of Education would have to be obtained,

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it shall be obtained notwithstanding what is contained in the earlier sections.

I am, therefore, thrown back, in construing the Act of 1905, upon the true construction of s. 62 of the Charitable Trusts Act, 1853, in order to find out whether the land now contracted to be sold is land which, but for ss. 11 and 12 of the Act of 1905, could not be sold without the consent of the Charity Commissioners or the Board of Education. Sect. 62 of the Act of 1853 is what I may call an exemption section. It commences by providing that certain universities and other institutions are not to be within the Act at all, but for the present purpose the first important exemption is that which relates to "any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions." Now it is not contended that this charity is wholly maintained by voluntary contributions. "Voluntary contributions" appears to me to be a wide term which includes contributions inter vivos, and contributions by will, and subscriptions in the nature of annual, or monthly, or other periodic payments; and the case contemplated is where the society is maintained wholly by contributions of that sort, and has no income or other property, outside the ambit of the voluntary contributions, upon which to depend for maintenance.

The section, however, does not end its series of exemptions there, for it goes on to provide that "where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof." Now, if you pause there for a moment, that provision appears to me to apply, and to apply only, to cases where the charity is maintained partly out of the income of—I will not say "endowment"; I will say "property"—because by the definition clause (s. 66) "endowment" includes all property held upon trust for the charity. Where the charity is partly maintained by the income of property, and partly maintained by voluntary subscriptions,—which apparently means payments of a periodic nature—the

jurisdiction of the Charity Commissioners, or the Board of Education as their successors, extends only to the income of the "endowment"—that is to say the income of the property—by the income of which the charity is in part maintained.

Charities of that nature have, in the cases, been called "mixed charities," and I gather that in the present case there is no dispute that the vendor charity is a mixed charity within the meaning of that expression—that is to say, it is maintained partly by voluntary subscriptions and partly by income arising from property held upon trust for it.

Then s. 62 of the Act of 1853 proceeds as follows: "And no donation or bequest unto or in trust for any such charity as last aforesaid"—which means a mixed charity—"of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act." I have, therefore, to decide in this case whether the land contracted to be sold falls within the description of a donation or bequest of which no special application or appropriation has been directed or declared by the donor or testator, and which may be legally applied by the governing or managing body as income in aid of voluntary subscriptions. If the land in question falls within that description, it appears to me that neither the Charity Commissioners nor the Board of Education can have any jurisdiction in the matter. The words in question have been the subject of a number of decisions, and the decisions, if not the words of the Act itself, have led to considerable conflict of opinion and considerable difficulty. It does not appear to me that there is any great difficulty in interpreting the words of the Act, and the difficulties occasioned by the decisions arise I think chiefly from the fact that in the earlier cases the word "endowment" is used as meaning something which it is not defined by the Act to mean. The Act says that all charitable properties and all properties held in trust for a charity are endowments of that charity, but the sense in which the word "endowments" is used in the cases is considerably narrower.

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What you have first to consider is whether the donor or testator devotes the property, by some direction which he has given, to some special purpose; and as incidental to that you have to consider whether the charity can apply the property for its general purposes, including income purposes as well as capital purposes. When you have ascertained that this is the case, then that particular property is exempted.

Without going into the cases in detail, I may state that the leading authority on the subject is *In re Clergy Orphan Corporation* (1), in which Lord Davey gave his well-known judgment. (2) Lord Davey points out in that case—and I respectfully agree with every word of his judgment—that, when once you have got a sum given to a charity which is not appropriated for a specific purpose, and which can be applied for income purposes, the mere fact that you invest that sum, whether it be in Consols or in land, does not make it property to which the jurisdiction of the Charity Commissioners extends; and, as I understand his judgment, he arrives at that conclusion from the words of s. 62 which follow those which I have read and are as follows: "And no portion of any such donation or bequest as last aforesaid,"—that is, as I understand it, any donation or bequest which is not specifically appropriated, and which can be employed for general purposes, including income purposes—"or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity" is to be subject to the jurisdiction of the Board.

I understand this clause to mean that no portion of the property lastly thereinbefore exempted from the jurisdiction is to be considered to be brought back into the jurisdiction by a specific appropriation such as is mentioned. I do not think the words are capable of any other meaning; and, of course, if the investment or setting apart of a sum for a specific

(1) [1894] 3 Ch. 145. (2) [1894] 3 Ch. 150.

purpose does not take the property out of the exemption, it must follow, as I think is suggested by Lord Davey, that the appropriation and setting it apart by way of investment, not for any specific purpose, but for the general purposes of the charity, cannot in its turn take the property out of the exemption.

Now, having referred to the section, I have to consider whether this particular property is or is not exempted. As I understand the history of the case, this charity was first formed in the year 1758, and in the year 1771 it purchased freeholds in the City Road as a site for a school, having theretofore carried on its school at Hoxton, and having the intention of moving it to the City Road. The land was bought and the school was erected, and the way in which the land and the buildings were paid for was as follows: The society, announcing its intention of moving its school from the one place to the other and erecting new buildings on the new site, asked for subscriptions for that purpose; and certain subscriptions were made for that purpose and were utilized in paying for the land and the buildings. But quite as much, as far as I can make out, was contributed by the society out of its ordinary subscriptions, received from donors, subscribers, or others, and which it could undoubtedly use for any purpose whatsoever connected with the charity.

The first point which appears to me to arise is whether those special subscriptions, allocated to the building fund of this school, were subscriptions or donations which were devoted by the donors to some special purpose and which the society could not apply for its general income purposes, but was bound to hold for the special purposes designated by the donor. As soon as the land was purchased the committee who had collected the subscriptions had it conveyed upon the trusts for the benefit of the society which are referred to in the Act of 1848, which first incorporated the charity. The land appears to have been conveyed to the trustees, to hold upon trust for and only for the use, benefit, and service of the said charity called the Orphan Working School—that was its then name—" and to be conveyed and disposed of from time to time in such manner as should be ordered and directed for that purpose at any general court or

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meeting of the subscribers to the said charity for the time being, and to or for no other use, trust, intent, or purpose whatsoever." Now it appears to me that under those words the land is conveyed in effect for the general purposes of the society, and not for any specific purpose. The governing body of the society have complete control over the disposition and disposal of it; and I think that that conveyance, made under the direction of the committee who collected these subscriptions, must, in default of evidence to the contrary, be taken to carry out the true intent and meaning of the subscribers who gave money in the first instance to the building fund.

That that principle is the right one to apply would appear from the case of *Attorney-General* v. *Mathieson*. (1) I need only read the head-note, which is as follows: "Where a charity is supported by voluntary subscriptions and donations given for the general purposes of the charity, the individual or committee entrusted with the money must, in the absence of evidence to the contrary, be deemed to have implied authority for or on behalf of the donors to declare by deed the trusts to which the sums contributed are to be subject; this deed, until set aside or rectified by the Attorney-General, must be treated as decisive of the trusts which by the authority of the donors are to regulate the charity." That was not quite the same case as this, because there the deed of trust limited the application of the fund to certain purposes, the subscriptions themselves appearing to be, in effect, general subscriptions for general purposes. This is rather the converse case, for here we have subscriptions which, on one construction of what was done, may be said to have been subscribed for a special purpose, but the committee who received the subscriptions, acting no doubt with more information than we have after all these years have passed, had trusts declared which were in fact general trusts; but it seems to me that if the committee are the agents for declaring the trusts, and what they declare is prima facie to be considered as carrying out the intention of the donors in the one case, the same principle ought to apply in the other.

That seems to be more especially so having regard to what was decided in the subsequent case of *In re Church Army* (2), where

(1) [1907] 2 Ch. 383. (2) 75 L. J. (Ch.) 467.

the Church Army collected subscriptions which they asked their subscribers to allocate to one or the other of certain special purposes, and the subscribers, following that request, did so, and a certain number of subscriptions were allocated to some specific purposes which involved the buying of land. Land was bought out of those subscriptions and certain other subscriptions which had been obtained by the Church Army, and it was held that the land so bought was within the exemption of the Act, because, in effect, the subscriptions which had been allocated to special purposes were subscriptions for the general purposes of the society.

It appears to me that, having regard to all the circumstances of this case and especially to the way in which the trusts were declared, I am justified in holding, and I do hold as a fact, that these subscriptions were not, within the meaning of s. 62 of the Act of 1853, appropriated by the donor upon any special trust, and that consequently the whole of them might have been originally applied for income purposes, as well as capital purposes, of the charity. Assuming this, the only question which remains is whether anything has since happened which would make the property now representing those subscriptions property to which the exemption no longer applies. As I have said, the money was invested in land; but the mere investing in land would make no difference. The mere conveyance of the land upon trusts for the general purposes of the society would make no difference. The subsequent history appears to be that the school in the City Road was in its turn closed, and the land was let. In the meantime the charity had been incorporated by the Act of 1848, and in the Act of 1905 you find the particular sections to which I have referred.

It is suggested that the effect either of the Act of 1848 or of the Act of 1905 must have been to make this property applicable only for capital purposes and to take it out of the power of the trustees, or the charity, or its governing body, to use the land or utilize the proceeds for other than capital purposes. I do not think that that is at all necessarily so, and I think that in this connection I may refer to the following facts. The Charity Commissioners have been consulted on the point, and they do

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not claim jurisdiction under the Charitable Trusts Acts. The Board of Education have been consulted on the point, and they do not claim jurisdiction. The Attorney-General has been asked whether he would like to intervene so as to obtain a decision which would be binding on all parties, and apparently he makes no claim, on behalf of any body whose interests it is his duty to protect, that the Charity Commissioners or the Board of Education have any jurisdiction. It is simply the purchaser in the present case who desires my decision on the point in order that he may quiet his title once for all.

That being so, it appears to me that, without considering the question as to the person on whom the onus of proof may lie with regard to matters which happened so long ago, I am justified in declaring, and I do declare, that, in the events which have happened, this land is, within the meaning of s. 13 of the Act of 1905, exempted from the jurisdiction and control of the Charity Commissioners for England and Wales or the Board of Education as the case may be; and, this being a vendor and purchaser case, the applicant must pay the costs.

Solicitors for applicants: *Armitage, Chapple & Macnaghten.*
Solicitors for the charity: *Gard, Rook & Co.*

F. E.

In re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY.

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1911
NEVILLE J.
July 11, 12; *Oct.* 23, 24, 25; *Nov.* 6.
1912
C. A.
Jan. 22, 23; *March* 25, 26, 27; *May* 18.

[00213 of 1911.]

Building Society—Rules—Borrowing Powers—Unlimited Borrowing—Banking Business — Ultra vires — Shareholders — Depositors — Trade Creditors — Priorities in Winding-up—Building Societies Act, 1836 (6 & 7 *Will.* 4, *c.* 32), *s.* 1.

In 1851 a building society was formed under the Building Societies Act, 1836, and was never registered under the Building Societies Act, 1874. Its shares were divided into two classes, A and B shares. Rule 35 empowered its directors to borrow to an unlimited extent; and rule 97 provided for the formation of a management and contingent fund, and that the expenses of management, interest, and bonus on A shares and any losses that might be incurred by the society should be defrayed out of that fund and the deficiency (if any) should be borne by the holders of B shares only in certain proportions. From its inception the society, in addition to the ordinary business of a building society, received money on deposit from its shareholders and the public generally, and this branch of its business grew into a large concern, known as the Birkbeck Bank, which carried on the business of banking in all its branches.

In 1911 the society was ordered to be wound up, and, the assets being deficient, questions arose between the outside creditors of the society, the A and B shareholders, and the depositors as to their respective priorities:—

Held by Neville J., that rule 35 was not ultra vires, for that the power to borrow must be construed as limited to borrowing for the proper objects of the society: *Murray* v. *Scott* (1884) 9 App. Cas. 519; but that the banking business was ultra vires, and that the depositors had no legal right to recover their money.

And *held*, following *In re Guardian Permanent Benefit Building Society* (1882) 23 Ch. D. 440, that the assets ought to be applied, first, in payment of the costs of the liquidation, next in payment of the debts of the outside creditors properly incurred, then in payment of the A and B shareholders of what was due to them, and then the balance rateably between the depositors.

The depositors appealed from this decision, but eventually an order was made by Neville J. and affirmed by the Court of Appeal sanctioning a scheme of arrangement between the depositors and A shareholders under s. 120 of the Companies (Consolidation) Act, 1908, to which the B shareholders were not parties.

On the appeal as between the B shareholders and the depositors:—

Held (affirming the decision of Neville J.), that the carrying on of the

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banking business by the society was ultra vires, and that the ultra vires transactions created no debt either legal or equitable in favour of the depositors, and therefore (Fletcher Moulton L.J. dissenting) that the depositors were not entitled to be paid in priority to the A or B shareholders.

Per Buckley L.J.: Where an association having no borrowing power receives money by way of loan or advance, the following propositions have been established:—

(1.) If the result of the transaction is that the indebtedness of the association is not increased because the new loan is applied in discharging an old debt, then it is not to be regarded as a borrowing transaction, for the invalid lender can be treated as standing in the place of those whose debt has been paid off: *In re Cork and Youghal Ry. Co.* (1869) L. R. 4 Ch. 748, 761; *In re Wrexham, Mold and Connah's Quay Ry. Co.* [1899] 1 Ch. 440.

(2.) The same doctrine is applicable even when the loan is applied in discharging not an old debt but a future debt: *Baroness Wenlock* v. *River Dee Co.* (1887) 19 Q. B. D. 155.

(3.) If the lender can identify his money or the investment of his money in the hands of the borrower, he can call for its return. In such case he is entitled to what is commonly called a tracing judgment; but

(4.) If the lender cannot bring himself within any of the above propositions, then he is a person who is unable as against the borrower to affirm that he holds a debt, either legal or equitable. Neither in a Court of law nor in a Court of Equity can he affirm that he is a creditor —*In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440, 451—or entitled to such a right or claim as would support a winding-up petition: *In re National Permanent Benefit Building Society* (1869) L. R. 5 Ch. 309. Nevertheless,

(5.) When all the members of the borrowing association have received 20*s.* in the pound upon their shares, the surplus, if any, is, according to the decision in *In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440, divisible among the ultra vires creditors rateably.

Decision of Neville J. declaring priorities affirmed.

SUMMONS taken out by the liquidator in the winding up of the Birkbeck Permanent Benefit Building Society for the determination by the Court of the respective priorities of the outside creditors, shareholders, and depositors of the society.

In 1851 the society was formed under the provisions of the Building Societies Act, 1836. Its object was (rule 2) to enable the members to raise a fund out of which they might be individually enabled, as provided in subsequent rules, to purchase or erect a dwelling-house or houses, or other real or leasehold estate in any part of Great Britain.

The society was never registered under the Building Societies Act, 1874. Its rules were amended from time to time. Down to the year 1873 all the shares in the society were of one class, but in that year they were divided into two classes, namely, "A" and "B." There were also advanced members, i.e., persons who borrowed money on mortgage from the society in accordance with the rules. The material rules were the following:—

"35. That the board of directors shall have power to borrow any sum, either from their bankers or any other source, and in case they or any of them shall for this purpose give their own personal security, the director or directors giving the same shall be indemnified in respect thereof by the society, and the trustees may, as security for the money borrowed, mortgage or deposit all or any of the securities, stocks, or other properties belonging to the society, other than mortgages from its members."

"64. That the shares shall be of the value of 50*l.* each. The entrance fees shall be 2*s.* 6*d.* on each share. The monthly subscription payable on 'B' shares shall be 6*s.* 6*d.* per share, which amount must be paid on or before the last day of each month, for the full period of ten years, when such subscriptions shall cease. 'A' shares may be issued, payable by voluntary subscriptions of 6*s.* 6*d.* per share per month, and such shares shall not be liable to fines under rule 67, except as provided in rule 98."

Rule 67 contained the table of fines payable by members who neglected to pay their monthly subscriptions.

"90. That 'A' shares may be withdrawn after the first year of their issue, on giving seven days' notice." Then followed a table shewing "the amount payable after twelve and every subsequent month, to the close of the tenth year."

"91. That 'B' shares may be withdrawn after ten years from the date of their issue or conversion, upon payment of all arrears and fines due, upon giving twelve months' notice in writing to the manager; but notice of withdrawal may be given at any time previous, and from the date of such notice of withdrawal being given he shall cease to be a member; provided always that payment of any debts due by the society shall, if required, be made before any share can be withdrawn; and that under no circumstances shall the sums paid for withdrawals exceed the

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income derived from repayments of advanced shares . . . . And that in case the expenses of the society, and any loss sustained by it, exceed the moneys appropriated to the management and contingent fund, all 'B' shares proposed to be withdrawn shall be chargeable with a due proportion of such excess, according to the number of years such 'B' shares shall have been in existence."

Rule 93 prescribed the rate of interest to be allowed on all completed shares.

"97. That all fines, fees, interest, and commissions whatsoever mentioned in these rules shall be passed to the credit of a management and contingent fund account; and the expenses of management, interest, and bonus on 'A' shares, and any losses which may be incurred by the society, shall be defrayed out of the said fund, and the deficiency (if any) shall be borne by the holders of 'B' shares only, in proportion to the number of such 'B' shares held by each respectively, and according to the length of time the same shares shall have been in existence."

Rule 98 provided that all unadvanced shares in existence on May 31, 1873, should be treated as "A" shares, and fixed the annual bonus to which such shares should be entitled.

Rule 99 prescribed the bonus to which the holders of "A" shares issued after May 31, 1873, should be entitled.

"100. That if at the end of the thirty-fourth financial year, and every subsequent three years, after providing a permanent guarantee fund of 100,000*l.*, and making provision as a temporary reserve fund of such an amount as the directors may from time to time determine (so as to allow for variation in the value of the investments of the surplus funds and other securities), any surplus profits remain, the same shall be apportioned as follows: that is to say, one third to be added to the permanent guarantee fund, and the remaining two thirds shall be divided among the holders of 'B' shares in proportion to the number held, and to the length of time they may have been respectively in existence; or the said surplus may be apportioned in such other way as the directors may from time to time determine: such bonus is not to be paid until the complete realization of each share,

or the discounted value may be paid on previous compulsory withdrawal."

Rule 102 empowered the trustees of the society from time to time to invest all surplus funds "not required for immediate use" in accordance with 10 Geo. 4, c. 56, s. 13.

"111. That in the construction of the rules . . . . The word member shall mean any person holding 'A' and 'B' shares. The word borrower shall mean those persons holding advanced shares. The word depositor shall mean those persons who lend money at interest to the society. The words 'B' shares shall mean shares that cannot be withdrawn until they have been in existence at least ten years, although the holders thereof may at any time previous cease to be members upon notice of withdrawal being given. The words 'A' shares shall mean shares that may be withdrawn at any time after they have been in existence twelve months, on giving one week's notice; and the words advanced shares shall mean those shares upon which advances have been made and secured by mortgage."

The business of the society was from the first carried on with great success and attained large dimensions. The society also from its formation received sums on deposit from its members and the public generally, and this branch of the society's business increased to very great proportions, and the society for many years before the commencement of its winding-up carried on, in addition to the ordinary business of a building society, a very extensive banking business, known as the "Birkbeck Bank," which conducted the business of banking in all its branches and had a large number of customers with deposit accounts, on various terms as to interest, withdrawal, and otherwise, and also a large number of customers with ordinary current accounts who drew upon their accounts by cheque in the ordinary way. These customers of the society in its banking business, whether on deposit or on current banking account, are hereafter referred to as "depositors."

Early in 1911 the society, owing to a run on the bank and the serious depreciation which had taken place in its investments, was in difficulties, and on June 8, 1911, it presented a winding-up petition under the Companies (Consolidation) Act, 1908, on

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which the usual compulsory order was made on June 20, and the official receiver became the liquidator.

At the date of the commencement of the winding-up there was due to the depositors of the society the aggregate sum of 7,368,477*l.* At the same date the total amount due to outside or trade creditors of the society was about 5000*l.* At the same date there were twenty-eight holders of completed or fully paid up "B" shares holding between them 266 shares of 50*l.* each for a total of 13,300*l.*; and about 1858 holders of completed or fully paid up "A" shares holding between them 6047 shares of 50*l.* each for a total of 302,350*l.*, and about 13,544 holders of uncompleted or partly paid up "A" shares, holding between them about 29,590 shares of 50*l.* each for a total of about 568,994*l.* There were also advanced members who had borrowed on mortgage from the society under its rules.

On presentation of the petition the official receiver was appointed provisional liquidator, and with the sanction of the Court at once borrowed the sum of 4,000,000*l.* from the Bank of England on the security of the assets of the society and paid an immediate dividend of 10*s.* in the pound to the depositors of the society on the amounts due to them respectively. The Bank of England subsequently realized its security and repaid itself.

Questions having arisen as to the rights, liabilities, and priorities of the various parties claiming to be interested in the assets of the society, the liquidator took out a summons to determine priorities, and also obtained an order appointing certain persons to represent the various classes of claimants. On the hearing of the summons on July 11 and 12 it was suggested by the Court, after lengthy arguments, that it was desirable in the interests of all parties and in order to avoid prolonged and expensive litigation that a scheme should be prepared under s. 120 of the Companies (Consolidation) Act, 1908, for the distribution of the assets of the society on an equitable basis, and the summons stood over for that purpose.

On July 27 a petition by the liquidator for the sanction of the Court to a scheme that had been approved by large majorities of the parties interested came on for hearing, but owing to the

opposition of a strong minority the scheme was not sanctioned, and the matter stood over for further consideration and eventually was not proceeded with.

On October 23 the summons came on again for hearing.

It appeared from the evidence that the funds of the society's business proper were never kept nor purported to be kept separate from those of its banking business. All receipts of the society from whatever source they arose were paid into a general account at its bankers and were applied quite indiscriminately in making loans on security or otherwise, honouring customers' cheques, purchasing securities or other assets, discharging liabilities of the society, and distributing profits and bonuses. The questions raised by the summons were as follows:—

1. Whether the outside creditors of the society, not being customers of the society on deposit or current banking account, were entitled to be paid off out of the assets in priority to the customers on deposit or current banking account.

2. Whether the customers of the society on deposit and for current banking account were entitled to be paid off out of assets in full before any payment or return was made to any holders of A and/or B shares in the society whether completed or uncompleted, or pari passu with the holders of all or any of such shares.

3. Whether the holders of completed or fully-paid A shares in the society and the holders of uncompleted or partly-paid A shares were under any and what liability to contribute to the assets so far as might be necessary to pay off in full the customers on deposit or current account.

4. Whether the advanced members of the society were in the same position as regards their rights and liabilities as the holders of the A shares, or, if not, what were their rights and liabilities relatively to (*a*) the general creditors, (*b*) the customers on deposit or current account, (*c*) the holders of fully-paid A shares, (*d*) the holders of partly-paid A shares, and (*e*) the holders of B shares.

5. Whether in ascertaining the amount (if any) of the deficiency under rule 97 of the society the amounts advanced by customers on deposit or current banking account and/or by holders of A shares in the society should be taken into account.

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Clauson, K.C., Sargant, and *C. W. Turner,* for the liquidator.

Jenkins, K.C., and *H. E. Wright,* for the outside creditors. The society had no power to carry on business as a bank, and depositors, whether on current account or otherwise, are not creditors of the society and have no claim on the assets. *Laing* v. *Reed* (1) and *Murray* v. *Scott* (2) clearly decide that though a borrowing power given to a building society by its rules may be valid, although unlimited as to amount, no such power can be given or exercised except for the purposes of the society. The banking business was, therefore, ultra vires, and the outside creditors are the only creditors of the society. It is suggested that the depositors had no notice, but all their books were headed "Deposit Branch of the Birkbeck Building Society." In the next place, we contend that the members of the society have made the directors their agents on the principle laid down in *In re West London and General Permanent Benefit Building Society* (3), and are therefore liable to contribute to the payment of the general creditors. We say that all the members are liable, but we do not wish to raise the question as to who are members.

Hughes, K.C., and *T. J. C. Tomlin,* for the depositors as a class. Rule 35 is perfectly valid. It is practically in the same form as that in *Murray* v. *Scott.* (4) That case and *In re Mutual Aid Permanent Benefit Building Society* (5) shew that a power to borrow is not bad because unlimited, and in the latter case the power was to borrow by "deposits on loan," which was just what was done here. The borrowing was legal, and if the money was improperly applied afterwards that did not concern the lenders. All depositors are creditors as in the case of an ordinary bank. The borrowing is not an improper application of the money. If it was afterwards misapplied the depositors had no notice—*In re David Payne & Co.*(6)—and are not affected. Nor had they notice that an ordinary banking business was being carried on. Their pass-books were headed "Deposit Branch of the Birkbeck Building Society." A building society may lawfully

(1) (1869) L. R. 5 Ch. 4.
(2) 9 App. Cas. 519.
(3) [1894] 2 Ch. 352.
(4) 9 App. Cas. 521.
(5) (1885) 30 Ch. D. 434.
(6) [1904] 2 Ch. 608.

receive deposits. Also there were differences from an ordinary bank. If a cheque was dishonoured by mistake the society were not liable. If the Court is against us on that point, the depositors have a right to recover all such part of their money as was properly applied for the purposes of the society—*Cunliffe Brooks & Co.* v. *Blackburn Building Society* (1)—and also to follow such of the assets of the company as represent their deposits. It is plain that the balance after payment of the shareholders must represent deposits: *In re Guardian Permanent Benefit Building Society.* (2)

J. A. Slater, for 1600 independent depositors representing half a million of money, adopted this argument.

Jessel, K.C., and *W. L. Seligman*, for the fully-paid A shareholders. In strictness the shareholders are entitled to divide all the assets, but we only use that argument to negative any right in the depositors to follow the assets. After the shareholders have been paid 20*s.* in the pound, we concede the rest of the assets to the depositors. The carrying on of the banking business was not only ultra vires but was forbidden by the Banking Acts, 39 & 40 Geo. 3, c. 28, and 7 Geo. 4, c. 46, s. 1, which forbid any "corporation or partnership consisting of more than six persons to carry on a bank in London." In the case of a borrowing which is an illegal prohibited transaction, the lenders can have no remedy at law or in equity: see judgment of Vaughan Williams L.J. in *In re Wrexham, Mold and Connah's Quay Ry. Co.* (3); *Gedge* v. *Royal Exchange Assurance Corporation.* (4) In *Cunliffe Brooks & Co.* v. *Blackburn Building Society* (1) the bankers were allowed to reserve such part of an ultra vires loan as had been expended in paying the society's debts, but the burden of proof was thrown on the bank. There is no case in which creditors in similar circumstances have been allowed to follow investments.

P. O. Lawrence, K.C., and *J. F. W. Galbraith*, for the partly-paid A shareholders. The ordinary creditors must be distinguished. Only those who are creditors of the building society's business proper should be paid, the creditors of the banking business can

(1) (1884) 9 App. Cas. 857.
(2) 23 Ch. D. 440, 451.
(3) [1899] 1 Ch. 440, 456.
(4) [1900] 2 Q. B. 214.

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have no claims. *Laing* v. *Reed* (1) and *Murray* v. *Scott* (2) clearly shew that a power to borrow which does not exclude personal liability of the shareholders would be ultra vires. The words, making the borrowed money a charge on the funds, which were held to exclude personal liability in the last case are rather meagre, but in this case there are no such words. The necessary expenses for which Wright J. made the shareholders liable in *In re West London and General Permanent Benefit Building Society* (3) are quite different from borrowed moneys. It is impossible to work out any such equity as that enforced in *Cunliffe Brooks & Co.* v. *Blackburn Building Society* (4), for each depositor has a separate right, and they cannot be lumped together. Each must prove that some part of his own deposit was applied in payment of the society's proper debts, and there might be a separate defence against each: *Baroness Wenlock* v. *River Dee Co.* (5) The shareholders have a better equity than the depositors: *Chapleo* v. *Brunswick Permanent Building Society.* (6) The order made by Jessel M.R. in *In re Guardian Permanent Benefit Building Society* (7) was perhaps a way of cutting the knot, but it is equitable and should be adopted here. The cases are on all fours. If it is not, the Court must decide the question whether the B shareholders are not personally liable under rule 97 to make good the losses of the society.

F. H. Maugham, for other A shareholders.

Gore-Browne, K.C., and *R. E. Vaughan Williams*, for the advanced members. The only way in which the advanced members can be endangered is that they should be made liable as members on the principle of *In re West London and General Permanent Benefit Building Society.* (3) In rule 111 "members" are defined and distinguished from "borrowers." The advanced shareholders are borrowers and not "members" and are only liable to repay the borrowed moneys by the instalments at the times and in manner provided in their mortgages.

Younger, K.C., and *A. M. Wells*, for the B shareholders.

(1) L. R. 5 Ch. 4.
(2) 9 App. Cas. 519, 538.
(3) [1894] 2 Ch. 352.
(4) 9 App. Cas. 857.
(5) (1887) 36 Ch. D. 674, 675, n.
(6) (1881) 6 Q. B. D. 696.
(7) 23 Ch. D. 440.

Rule 97 contemplates the formation of a management and contingent fund, but no such fund or account has been kept or exists. How that omission would affect the rights of parties and work out cannot on present materials be determined. If the depositors are paid in full, the question as to the liability of the B shareholders under rule 97 may not arise, but it is vital to them to contend at the proper time that the deficiency in the assets is not due to losses incurred in the proper business of the building society, but to the improper carrying on of the banking business. Under rule 100 a permanent guarantee and reserve fund should have been formed. It is impossible to say now what are the losses mentioned in rule 97 that the B shareholders are to bear because the funds that should be available to meet those losses do not exist. Further, it is doubtful whether rule 97 has any reference to a winding-up or goes further than the similar provision in rule 91.

[NEVILLE J. The judgments in *Murray* v. *Scott* (1) appear to proceed on the assumption that it is ultra vires to impose by any rule personal liability on any of the shareholders beyond the amount due to outside creditors.]

The point also seems to be assumed in the judgment in *In re Mutual Aid Permanent Benefit Building Society*. (2) If the true view is that by no rule can any member be made personally liable except for outside debts, then no member can be made personally liable for adjusting the rights of the members inter se, and rule 97 is ultra vires and void. There is no direct authority, but in the case *In re Reliance Permanent Benefit Building Society* (3) preference shareholders were held not personally liable to contribute to the losses of the society.

Jessel, K.C., for the fully-paid A shareholders, in reply to the B shareholders. If we are not entitled to be paid 20*s.* in the pound in priority to all other creditors, then the B shareholders must make good to us the deficiency. They have for a number of years been drawing a large share of the profits and are bound under rule 97 to contribute to the losses. The other creditors cannot take advantage of the rule. It is a domestic matter

(1) 9 App. Cas. 519, 538. (2) 30 Ch. D. 434.
(3) (1892) 61 L. J. (Ch.) 453; 66 L. T. 823.

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between the A and B shareholders for the benefit of the A shareholders, and it is immaterial that the contingency fund is not in existence. Both classes of shareholders are equally liable for its omission. It is an incident in the administration of the assets to be taken by itself, and the B shareholders are bound to indemnify us against any loss. The case of *In re Reliance Permanent Benefit Building Society* (1) is distinguishable.

J. F. W. Galbraith, in reply for the partly-paid A shareholders, adopted the same line of argument and cited *In re West Riding of Yorkshire Permanent Benefit Building Society*. (2)

Cur. adv. vult.

1911. Nov. 6. NEVILLE J. The Birkbeck Permanent Benefit Building Society was established in 1851, and is subject to the provisions of 6 & 7 Will. 4, c. 32, under which benefit building societies for the first time received statutory recognition and protection. This Act incorporates the then existing Friendly Societies Acts, 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40. The preamble to 6 & 7 Will. 4, c. 32, recites the establishment of certain societies commonly called building societies in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and declares it to be expedient to afford encouragement and protection to such societies and the property obtained therewith. It is then enacted that it shall be lawful for any number of persons to form themselves into societies for the purpose of raising, by monthly or other subscriptions of the several members of such societies, (3) shares not exceeding the value of 150*l.* for each share, such subscriptions not to exceed on the whole 20*s.* per month for each share, a stock or fund for the purpose of enabling each member to receive out of the funds of such society the amount or value of his share or shares, to erect or purchase one or more dwelling house or dwelling houses or other real or leasehold estate to be secured by way of mortgage

(1) 61 L. J. (Ch.) 453; 66 L. T. 823.

(2) (1890) 43 Ch. D. 407.

(3) The remainder of the sentence follows the ungrammatical language of the Act.

to such society until the amount or value of his shares shall have been fully repaid to such society with the interest thereon, and all fines or other payments incurred in respect thereof. Then follow powers to make such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members shall seem meet. The validity of a rule empowering the society to borrow was long in doubt, but was set at rest, so far as a power to borrow a limited amount was concerned, by the case of *Laing* v. *Reed.* (1) That a rule empowering borrowing to an unlimited extent was valid was not decided before the case of *Murray* v. *Scott.* (2)

The first question I have to determine is whether rule 35, giving unlimited borrowing powers to the board of directors, is ultra vires and invalid. In *Murray* v. *Scott* (2) it was determined that a power of borrowing to an unlimited extent was not ultra vires where the power was confined to borrowing for the objects of the building society, and did not authorize the pledging of the credit of the members of the society. In the rules upheld in *Murray* v. *Scott* (2) the words "as occasion may require" were held to limit the powers to the objects of the society. It seems to me that even where such words are absent the statement of the objects of the society, followed by a power to borrow which is silent as to the purposes for which the power may be exercised, should receive the same interpretation, and that the power should be construed as limited by implication to the objects of the society as declared by its rules.

With regard to the liability of members the rule in *Murray* v. *Scott* (2) is similar in expression to the rule in the present case, but I have some little difficulty in ascertaining whether such differences as exist are material in this respect, inasmuch as I am not clear as to what it was in the rules in *Murray* v. *Scott* (2) which made it clear to the House of Lords that the personal liability was excluded. It was not expressly excluded, and as a general rule one would have supposed that the giving of a charge upon the assets and providing for the indemnity of the trustees should they make themselves personally liable was not inconsistent with the personal liability of the members, but I think

(1) L. R. 5 Ch. 4. (2) 9 App. Cas. 519.

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the meaning must be that having regard to the character of the society no personal liability on the part of the members is to be inferred in the absence of express words rendering them liable if any other source for the repayment of the loans is indicated; and if I am right in this the reasoning applied to the rules in *Murray* v. *Scott* (1) would be equally applicable to rule 35 in the present case. In my opinion, therefore, rule 35 is not ultra vires.

Upon the slender legal foundation of this borrowing power, however, was reared the huge structure of the Birkbeck Bank, and the question arises as to whether the carrying on of this bank was an object of the building society within the statute of 6 & 7 Will. 4 and its rules. I have to consider whether the business of a bank is one of the objects of a building society, and I think there can be only one answer to that question—that it is not. It is said that the business of a bank is to borrow money from its customers, so that a society having an unlimited power to borrow, accompanied by a power to invest surplus funds, has all the powers necessary for carrying on a banking business. It appears to me, however, that borrowing and investing are but two branches of a banking business, and that a building society conducting a banking business in all its branches, including the discounting of bills, is conducting a business quite foreign to the business of a building society. Here the borrowing was on a scale altogether in excess of the requirements of the society, and for that reason alone ultra vires of the directors, but no doubt that would not invalidate the claims of persons who had bona fide advanced their money in the belief that the borrowing was to meet the requirements of the society. But here it seems to me that the depositors had in their books provided for their accounts the fullest notice that they were advancing their money to a bank which carried on the business of banking in all its branches. As a matter of fact, I do not for a moment suppose that the majority thought they were dealing with anything but a bank, but even on the assumption that they intended to deal with a building society possessing an unlimited borrowing power, they had, in my opinion, the amplest notice that the money was not being borrowed in the legitimate exercise of that power.

(1) 9 App. Cas. 519.

It was argued that the depositors had a legal claim against the society for money lent unless in any case it could be shewn that the money so lent had been misapplied. In my opinion this is not so, but the depositors, having notice that the directors, on whose power to borrow they are compelled to rely, were borrowing for a purpose not within the power, have no legal claim against the society, but are relegated to an equity with which I will deal later. The fact that this banking business has been long carried on and with the widest notoriety cannot, I think, avail to legalize what in its inception and throughout its career has been an illegal transaction. It is indeed astonishing that it was nobody's business and that nobody had ever made it his business to inquire into the matter and challenge the validity of the transaction, but so it appears to have been, notwithstanding the fact that the position of the society has, I believe, been the subject of discussion both inside and outside Parliament. The conclusion I arrive at, therefore, is that, although rule 35 is in itself valid, the attempt to exercise the power, if indeed the power was at all relied upon, by carrying on the business of the Birkbeck Bank was ultra vires and illegal, and that the depositors had notice of such illegality.

It has been argued that the action of the depositors has been illegal to an extent which must deprive them of the right to obtain assistance from a Court of justice, and that they are no more entitled to relief than a highwayman to obtain a share of the nefarious gains of his accomplice or a gambler to recover the amount of his successful bet. This appears to me fallacious. The parties, I think, have acted under a mutual mistake of law, and although in many cases money paid under a mistake in law is irrecoverable, this rule, I think, is not applicable to a case like the present: see *In re Guardian Permanent Benefit Building Society*. (1)

To permit the members of the society to divide amongst themselves, as profit, money obtained as this money was from the depositors appears to me inconsistent with the most elementary notions of justice, and at variance with previous decisions. It may be impossible, owing to the complication of the transactions,

(1) 23 Ch. D. 440.

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to prevent some advantage accruing to the members owing to the illegal borrowing of the directors, but in my opinion, so far as it is possible to trace the moneys or securities acquired with moneys coming from the depositors, and so far as it can be shewn that any such moneys have been applied in payment of liabilities of the society, the depositors are entitled in equity to relief. The difficulty of tracing the moneys in the manner suggested would no doubt be great, no separate accounts having been kept. Under very similar circumstances, in the case of *In re Guardian Permanent Benefit Building Society* (1) the Court of Appeal decided that the creditors of the society and the unadvanced members must be paid in the first instance, and the balance of the assets divided amongst the lenders from whom advances had been obtained without legal authority. It was stated on behalf of the customers of the bank that an order in a similar form would be more advantageous to them than any attempt to work out the equities suggested above, and it appears to me that I ought to follow that decision of the Court of Appeal, and that an order should be made directing the assets to be applied, first, in payment of the costs of the liquidation, including the costs of the applicant and respondents upon the summons, then in payment of the debts of the ordinary creditors properly incurred, then in payment of the unadvanced members, that is A and B shareholders, of what is due to them, and then the balance to be distributed pro rata amongst customers of the bank.

It appears under an order of this character unnecessary to determine the liability of members to contribute either for the purpose of paying debts or returning to the members the amounts due to them, inasmuch as I gather that the assets will be ample for that purpose. No question as to the existence of any personal liability on the part of those who conducted the business of the bank or held themselves out as proprietors of it is now before me.

H. L. F.

C. A.

From this decision the depositors appealed.

The appeal came on for hearing before the Court of Appeal on January 22 and 23, 1912, but after lengthy argument the Court

(1) 23 Ch. D. 440.

suggested that a scheme of compromise should be prepared and adjourned the further hearing of the appeal.

A scheme of arrangement with the depositors and the A shareholders under s. 120 of the Companies (Consolidation) Act, 1908, was subsequently agreed on. It was, however, found impossible to agree on a scheme which would include the B shareholders. The scheme provided (clause 1) that the assets of the society should be realized, and the proceeds applied, first, in payment in full of all sums owing to secured creditors, including all sums borrowed by the liquidator or the provisional liquidator with the sanction of the Court; secondly, in payment in full of all fees, costs, charges, and expenses of and incident to such realization; thirdly, in payment in full of all creditors of the society (if any) who by virtue of s. 209 of the Companies (Consolidation) Act, 1908, or otherwise, were entitled to be paid in full in priority; fourthly, in payment in full of all fees, costs, charges, and expenses of the liquidation, and of and incident to the preparation and confirmation of this scheme, and the remuneration of the liquidator and the provisional liquidator and the special manager, which should be fixed by the Court from time to time; fifthly, in payment in full of all creditors of the society, other than depositors as thereinafter defined; sixthly, in setting aside a sum of the amount and for the purpose stated in clause 7; and, lastly, that the balance should be divided pari passu between the depositors and the holders of A shares. Clause 7 provided that a sufficient sum should be set aside to cover any claims of the holders of B shares (the nominal value of which was 13,300*l.*), and the costs of resisting those claims and of proceedings to enforce against the holders of B shares, whether as such or as directors or otherwise, any liability which the official receiver and the liquidator might be advised to proceed to enforce; and that the balance of this sum after fulfilling the purpose aforesaid, and also any moneys recovered from any of the holders of B shares, should be ultimately distributed between the depositors and the holders of A shares as further dividend.

A petition for the sanction of the Court to the scheme was presented and came before Neville J. on March 12. It was opposed by the B shareholders on the ground that the scheme

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would affect them injuriously. Neville J. made an order sanctioning the scheme. The B shareholders appealed.

On March 25 this appeal and the appeal from the order of November 6, 1911, came before the Court of Appeal. The appeal from the order of March 12 sanctioning the scheme was first argued.

The COURT (Cozens-Hardy M.R., Buckley and Fletcher Moulton L.JJ.) dismissed the appeal, but directed the insertion at the end of clause 7 of the words "A sufficient part of the said sum to be applied in due course of administration in satisfaction of the said claims of the holders of B shares as such."

The appeal from the order of November 6, 1911, was then resumed.

Buckmaster, K.C., F. E. Smith, K.C., and *T. J. C. Tomlin*, for the depositors. By the order of November 6 we are postponed to all the shareholders; and it cannot be right that they should be paid before us. The shareholders took money from us on the footing that they were carrying on a legal business, and there was no reason why we should doubt their power to carry on such a business. By rule 35 the society had unlimited borrowing powers. That rule was perfectly valid: *Murray* v. *Scott* (1); although of course it might have been used for some wrong purpose. There was nothing to make us suspect that anything was wrong, and we advanced money in four different ways: (*a*) on a deposit account on which interest was paid at 2½ per cent., the depositor having the right to withdraw on twelve occasions in each year; (*b*) on current account, on the balance of which interest was paid; (*c*) on a deposit receipt which carried interest at the bank rate and gave a right to withdraw on seven days' notice; (*d*) money on deposit for periods of twelve months with interest at 3½ per cent. In all cases depositors were informed by the officials that this was the deposit branch of the building society. For the present purpose the question is not whether the society was really in want of our money, but whether it thought it was. In

(1) 9 App. Cas. 519.

that case it had ample borrowing powers and was not obliged to sell investments. The depositors never had anything to do with the management of the business.

The society had power to invest surplus funds under the Building Societies Act, 1836, and s. 13 of the Friendly Societies Act, 1829. It had, therefore, all the powers necessary for carrying on a banking business, except perhaps that of discounting bills. By rule 35 the society had on the face of it power to borrow for all purposes—not for such purposes only as were mentioned in rule 2—and that is sufficient to protect us. To be affected with notice of a breach of the rules a lender to the society must have knowledge of the breach; that he had the means of knowledge is not enough. It is impossible to prove that every individual lender had knowledge, and that is what the society has to shew. On the contrary there is no evidence that any one knew that the money was borrowed for an improper purpose.

[BUCKLEY L.J. The question is whether the society had power to borrow anything except for the purposes of the society as a building society. It was obvious that the society must be borrowing more than it wanted for those purposes, and that it was carrying on a banking business.]

The depositors were told that this was the deposit branch of the building society, and that was all they had to know; they could not know the extent of the society's operations; and the language of the forms used told them nothing. There was no reason why the society should not carry on a banking business. It is only a lending and borrowing business, and that is authorized by the Building Societies Act, 1836. The only restriction on the society's lending is that imposed by s. 13 of the Friendly Societies Act, 1829.

At all events the depositors' money, so far as it was used for the purposes of the society, was a valid loan. We have lent money for the purposes of a building society, and all that we were told was that the society had power to invest it temporarily. There was nothing to shew that it was not following rule 10. If the society has failed and can no longer repay us, the consideration for the loan has failed, and we can recover the money

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lent in an action for money had and received: *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1)

The balance-sheets shewed that this banking business was gradually growing up; they were supplied to all the shareholders, yet no objection was ever made to it. The depositors did not know this, and there is no evidence of knowledge on their part. If we are allowed to come in before the shareholders we shall compete with the outside creditors, but the amount of their debts is so small in comparison with ours that we do not object to their being paid in full and dismissed from these proceedings.

We agree that rule 35 refers only to borrowing for the purposes of the society, and that some such words as "as occasion may require" must be read into it, as in *Murray* v. *Scott.* (2) *In re David Payne & Co.* (3) is a clear authority that where a company has a general power to borrow money for the purposes of its business a lender is not bound to inquire into the purposes for which the money is intended to be applied, and the misapplication of the money by the company does not avoid the loan in the absence of knowledge on the part of the lender that the money was intended to be misapplied. The only question in the present case is whether the depositors must be taken to have had notice that their money would be used for improper purposes; and there is no evidence to that effect. The banking business grew up gradually. Up to 1870 it was carried on by an agency which was properly doing the work of a building society. There has been no change in the manner in which the business has been carried on, and it is impossible to point to any particular date as the moment at which the operations became irregular.

It may be that some of the depositors saw the balance-sheets and the forms used in the banking business and had their attention called to what was going on, and thus had notice; but the great majority of them had no notice, and ought not to be treated as in the same position. It is not equitable that members of the society who took the profits made by the use of our money should have priority over us in the winding-up. If we had notice, a fortiori they must have known the true position. At all

(1) [1898] 2 Ch. 663; [1899] 1 Ch. 205. (2) 9 App. Cas. 519.
(3) [1904] 2 Ch. 608.

events where our money has been spent in paying legal debts we ought to be allowed to represent those creditors: *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1); *In re Guardian Permanent Benefit Building Society.* (2) The cases on ultra vires have no doubt gone very far: *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (3); *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (4) The present case is, however, distinguishable from all those authorities by the fact that here there is an unlimited power to borrow which is clearly legal, and the improper use of that power does not affect the depositors. It would have been useless to ask for a tracing order in this case, as it would have been practically impossible to work it out.

[BUCKLEY L.J. referred to *Ex parte Watson.* (5)]

It is submitted that that case was wrongly decided, for the decision seems to involve the proposition that if a company has borrowed money ultra vires it cannot repay it; but that case and *In re Bottomgate Industrial Co-operative Society* (6) are distinguishable, because what was there attempted was to validate a non-existent debt by giving security for it.

The point settled by *In re Wrexham, Mold and Connah's Quay Ry. Co.* (7), that where the borrowing being ultra vires the consideration for the loan has failed, has never been fully dealt with by the cases, and it is important because it takes the case out of *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (4)

[COZENS-HARDY M.R. Was not the society prevented from carrying on a banking business by the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 21?]

That Act merely imposes penalties for not making certain returns; it does not make the carrying on of the business illegal.

Upjohn, K.C., *Younger, K.C.*, and *A. M. Wells*, for the B shareholders. The order of November 6 was right, and we

(1) [1898] 2 Ch. 663; [1899] 1 Ch. 440, 456.
(2) 23 Ch. D. 440.
(3) 9 App. Cas. 857.
(4) (1885) 29 Ch. D. 902.
(5) (1888) 21 Q. B. D. 301.
(6) (1891) 65 L. T. 712.
(7) [1899] 1 Ch. 440, 456.

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further contend that rule 35 was ultra vires and invalid, and therefore the loans made by the depositors did not create any legal debts. It is said that the money thus advanced can be recovered from the society in an action for money had and received. If that is so, all the cases on loans made to societies which had no borrowing powers would have been simple actions for money had and received. But such a doctrine is not supported by *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1) or any of the cases. It cannot be supposed that if such a contention were valid it would not have been advanced in such cases as, for example, *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (2) The depositors are asking the Court to overrule many well-known cases, for instance, *Ex parte Watson* (3); *Baroness Wenlock* v. *River Dee Co.* (4) In an ultra vires transaction of this kind there is no debt and the society is not liable: Buckley on Companies, 9th ed. p. 227. The directors may be personally liable, but the society is free. There is no halfway house between the bank's customers being lawful creditors and their having no claim at all. We do not deny that the depositors have an equitable claim against the assets, and may individually have a tracing order to enforce it. The only other remedy open to them is pointed out in *In re Guardian Permanent Benefit Building Society.* (5) In the present case the society was forbidden to act as a banker: *In re Bottomgate Industrial Co-operative Society* (6); *Attorney-General* v. *Great Eastern Ry. Co.* (7)

The society having no power to incur these debts to the depositors, there is nothing which can be ratified by the members: *In re National Permanent Benefit Building Society* (8); *In re Guardian Permanent Benefit Building Society.* (9) All the parties to these transactions had notice and knew perfectly well that the society was a building society with no power to carry on a banking business. To constitute ratification it must be shewn that

(1) [1899] 1 Ch. 440.
(2) 29 Ch. D. 902.
(3) 21 Q. B. D. 301.
(4) (1885) 10 App. Cas. 354.
(5) 23 Ch. D. 440.
(6) 65 L. T. 712.
(7) (1880) 5 App. Cas. 473.
(8) L. R. 5 Ch. 309.
(9) 23 Ch. D. 451.

something has been done which requires ratification and that there is an intention to ratify: *In re Kent Benefit Building Society.* (1)

It has been suggested that the money should be traced by ratios, and that the assets should be divided in proportion to the respective interests of the parties as in the order set out in *Murray* v. *Scott* (2), but there is no authority, or principle, or reason for adopting such a course.

By the Building Societies Act, 1836, s. 4, the provisions of the Friendly Societies Acts, 1829 and 1834, were made applicable to benefit building societies, and the purposes of the society have to be declared by its rules. This society is governed by the Act of 1836. Its object was to advance money to members. No limit is imposed by rule 35 on the amount which may be borrowed; but that is inconsistent with the rest of the rules, especially rule 97. The rule is therefore ultra vires: *Laing* v. *Reed.* (3) The test of whether a rule is ultra vires or not is whether it makes the society "a thing different from a benefit building society": *Laing* v. *Reed* (4); *Murray* v. *Scott.* (5) There is no exemption from liability of the A shareholders in case of loss. The liability of the B shareholders is thrown upon their shares and is not personal. The liability of members is inconsistent with the nature of a building society: *In re Mutual Aid Permanent Benefit Building Society.* (6) The depositors had notice of the facts. Every one who deals with a building society is presumed to have notice of its constitution: *Chapleo* v. *Brunswick Permanent Building Society.* (7) All the depositors knew that they were dealing with a building society which could not carry on a banking business; the documents shewed that the society called itself a bank and did carry on business as a bank; and the lenders treated it as a bank.

The duty of a building society is to raise money by small periodical payments to enable it to advance money to its members to buy small properties. It is impossible therefore that deposits

(1) (1861) 1 Dr. & Sm. 417.
(2) 9 App. Cas. 519, 528.
(3) L. R. 5 Ch. 4.
(4) L. R. 5 Ch. 10.
(5) 9 App. Cas. 519, 537.
(6) 30 Ch. D. 434.
(7) 6 Q. B. D. 696.

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of some fifteen or sixteen million pounds should be effected intra vires, where the advances to members only amounted to 700,000*l.* and the members themselves had paid up over 1,000,000*l.* The decision in *In re Guardian Permanent Benefit Building Society* (1) was nothing more than a legitimate extension of the doctrine of tracing. The depositors in that case were held entitled to the surplus assets because no one else could substantiate a claim to them; it was therefore assumed that they belonged to the depositors.

Jessel, K.C., and *W. L. Seligman*, for the fully-paid A shareholders.

P. O. Lawrence, K.C., and *J. F. W. Galbraith*, for the partly-paid A shareholders.

Gore-Browne, K.C., and *R. E. Vaughan Williams*, for the advanced members.

Jenkins, K.C., and *H. E. Wright*, for the outside creditors.

Clauson K.C., *Sargant*, and *C. W. Turner*, for the liquidator.

Buckmaster, K.C., in reply. No adequate reply has been given to the contention that the depositors are entitled to recover their deposits from the society as money had and received. It is no argument to say that the point has not been taken in previous cases. If the contention is so easy to answer it is for the Court to say what that answer is.

[COZENS-HARDY M.R. This Court has again and again said that in a case like the present there is no legal or equitable debt.]

In those cases this particular point was not raised. It is a novel contention with which the Court is bound to deal.

In *In re Coltman* (2) it was held that a loan made by a friendly society might be recovered back notwithstanding that the society had no power to lend. The law is that money which is borrowed for an illegal purpose and not applied for that purpose may be recovered back. Different considerations arise in a case where there is an illegal contract: *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (3)

Cur. adv. vult.

(1) 23 Ch. D. 440. (2) (1881) 19 Ch. D. 64.
(3) (1875) L. R. 7 H. L. 653, 672.

May 18. The following written judgments were delivered:—

COZENS-HARDY M.R. This is an appeal from an order of Neville J. in the winding up of the Birkbeck Permanent Benefit Building Society declaring that the assets ought to be applied, after providing for costs and the claims of those who may be called outside creditors, in returning to unadvanced members the amount due to them, and that the surplus should be divided rateably amongst those who may be conveniently called the customers of the bank. The shareholders are of two classes, A and B. By an order subsequently made by Neville J. and confirmed in this Court, a scheme was approved, the effect of which was that the customers and the A shareholders pooled what would come to them under the order; the result of which is that an immediate distribution has taken place, or will shortly take place, and the great bulk of the assets will be disposed of. The scheme did not, however, touch or in any way affect the rights of the B shareholders. They are a small body, but it is necessary to consider the difficult questions which arise, although the claims of the A shareholders have been got rid of.

The position in point of law of a benefit building society is peculiar. It has been settled by the House of Lords that a rule of a society expressly authorizing a borrowing without limit for the purposes of a society and without imposing individual liability upon the members is valid, but it has also been held that the borrowing power, whether limited or unlimited, is invalid if in effect it turns the building society into what is in truth a bank: see *Laing* v. *Reed* (1) and *Murray* v. *Scott.* (2) If a building society having no borrowing power purports to borrow, or with a limited power purports to borrow in excess of the limit, or with a power limited or unlimited purports to borrow as a bank, the so-called contract of loan, though not illegal, is void, and in truth has no existence. No legal or equitable debt is created by the transaction. If the persons who have purported to lend to the society can follow the money into particular investments, what is known as a tracing judgment may be obtained. If no such tracing judgment can upon the facts be fruitful, it has been held

(1) L. R. 5 Ch. 4. (2) 9 App. Cas. 519.

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in this Court that the intending lenders can take the ultimate surplus after satisfying admitted creditors and the amount due to unadvanced members. It has further been held by a Divisional Court in *Ex parte Watson* (1) that a society, which has received money under these circumstances from intending lenders under the belief that the borrowing was lawful, cannot when the mistake has been discovered return the money to the lenders.

Now, on the facts of the present case, I feel no doubt that the society was carrying on a huge banking business altogether beyond what was authorized. It is really unnecessary to go into details. This branch of the society's business was called a bank. It did all kinds of banking business. It was a bank, and the depositors and other persons who dealt with it undoubtedly dealt with the society as a bank and not as a building society. I think, therefore, that we are bound to say that the customers represented by Mr. Buckmaster have no legal or equitable debt which would entitle them to be paid before the shareholders whether of the A or B class.

A very forcible argument was urged by Mr. Buckmaster that if the money of a lender was paid, say, in the shape of a bag of gold, still untouched in the society's safe, that bag of gold could be claimed by the customer as his money, and that if the gold has been blended with all the assets of the society, and cannot be traced, the lender ought, on general principles, to be entitled to maintain an action for money had and received. The first part of this proposition seems to me sound, but the second part would destroy the whole doctrine as to ultra vires borrowing. So far as I am aware, this particular argument has not been presented before, and it may possibly be urged in the House of Lords. But, so far as this Court is concerned, I think we are bound by the decisions which have negatived the existence of any legal or equitable debt, and have directed a division of the assets inconsistent with the contention now raised.

Neville J.'s order gives to the customers precisely that limited relief which was given by this Court in the *Guardian Case.* (2) There is no appeal against that part of the order, and it is therefore

(1) 21 Q. B. D. 301.

(2) *In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440.

not necessary for me to say more than this, that the decision in the *Guardian Case* (1) is none the less binding upon me, although I feel a difficulty in discovering the principle on which it was based. It seems to me a rough and ready tracing judgment, illogical, but possessing the merit of attempting to do partial justice to the lenders. If the lenders represented by Mr. Buckmaster are to obtain more than has been given to them by Neville J., I think they must assert their rights in the ultimate tribunal. In my opinion, the order of Neville J. declaring priorities must be confirmed, and the appeal must be dismissed. But, having regard to the magnitude of the interests involved and the representative character of the proceedings, I think the costs of all parties to this appeal should be paid out of the assets.

FLETCHER MOULTON L.J. This appeal is a matter arising out of the liquidation of the Birkbeck Permanent Benefit Building Society, which was formed in 1851 under the Building Societies Act, 1836, the object being "to enable the members to raise a fund out of which they might be individually aided" (as provided in the rules of the society) "to purchase or erect a dwelling house or houses or other real or leasehold estate in any part of Great Britain." Until the year 1873 there was but one class of shareholder in the society now known as the A class, but in that year a new type of shares called the B shares was introduced. On June 8, 1911, when the winding-up order was made, there existed 33,637 A shares wholly or partly paid up held by 15,402 shareholders, and 266 B shares which were held by twenty-eight shareholders. The amount of each share was 50*l*. This does not include certain advanced shareholders holding qualification shares in order to obtain advances on mortgage. They were not considered to be members of the society and do not concern us here.

By the rules of the society the directors had the power to borrow, the amount not being limited. In the early years of the society this was done by accepting deposits which no doubt were at first used for the normal purposes of the society, but gradually this practice of accepting deposits grew until the business of the society became to all intents and purposes that of a bank. So completely

(1) *In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440.

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was this the case that for many years before it passed into liquidation it had been holding itself out as doing every kind of banking business and had been actually doing such business on a very large scale. It used on most if not all of the documents passing between it and its banking customers the title of "Birkbeck Bank," and in fact it was universally known by this title and was regarded by the public as one of the important smaller banks of London. The clientèle was mainly among people of very moderate means, a class of depositors for whom its terms and modes of business were peculiarly suitable. The scale of the operations of the so-called Birkbeck Bank at the time of its winding up may be gathered from the fact that in the year ending March 31, 1910, the accounts shew receipts on deposit of over 16,000,000*l.* The actual amount of money held on deposit on that date was over 8,000,000*l.*, and in addition there was a balance of over 2,000,000*l.* on current account. Figures like these are out of all proportion to the scale of what I may term the legitimate business of the society. The advances on mortgage during that year were about 75,000*l.*, and the total mortgages held by the society at the end of the year amounted to less than 720,000*l.*, so that an overwhelming proportion of the receipts and payments were not in respect of the business of the building society, but of that of the bank which the society was carrying on. These facts and the documents published by the company and sent to the shareholders establish to my mind beyond all possible contradiction or even argument that the society was openly carrying on a regular banking business on a large scale and was known to be so doing to every depositor and to every shareholder capable of knowing any business fact. I therefore purposely refrain from going into the details of the evidence on this point.

It is evident that a business of this kind was ultra vires of the society. It made it something other than a benefit building society, that is to say, other than that which it was permitted to be by the Act under which it was formed. It was pressed upon us in the very able argument of Mr. Buckmaster on behalf of the appellants that inasmuch as there was power of borrowing, each acceptance of a deposit was prima facie within the powers of the

society, and that it was not for the lender to see that the money was not misapplied. I agree with the view that this would be the case if isolated loans were taken by a society with power to borrow, but in my opinion the acts of the society had brought it entirely beyond that stage, and for good or evil it must be taken to have been carrying on business as a bank. Indeed the striking feature of this very sad case is the perfect sincerity and openness which characterized its action in this respect. It is not too much to say that it was regarded as a bona fide bank by the public at large as well as by its customers, its shareholders, and even its directors. No one seems to have had a doubt as to the legitimacy of the business it was carrying on. We are thus brought face to face with the problem of a continued course of ultra vires transactions on the largest scale which, though contrary to the law, are not shewn to have been tainted in any way with fraud or conscious misdoing on the part of any of those involved or taking part in it. The period during which these ultra vires transactions have been thus carried on covers undoubtedly at least half a century.

In the course of last year the credit of the bank became impaired, more from the effect of external causes and the feeling in the financial world outside than from any act of the bank itself. There ensued a run upon it which became so severe and prolonged that it was driven into liquidation. It was then found that the value of the securities held by the bank was far less than the amount at which they stood in the books of the society, due partly to the fault of the directors in selecting investments unwisely and in disregard of the limits of their authority to invest, and partly to a continued fall in the value of securities which had not been duly allowed for. The consequence is that there is a large deficit. The assets amount to several millions and the claims to considerably more, and this appeal deals with the priorities of the three classes of claimants from whom the society has received payments, namely, the depositors, the A shareholders, and the B shareholders. The A shareholders and the depositors have very wisely adjusted their rival rights by an amicable agreement, and the only question that remains for us to decide is as to the position of the claims of the B shareholders.

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There is nothing peculiar in the constitution of the society excepting so far as regards the existence and the rights and powers of the holders of B shares. These shares were all fully paid up. According to the rules of the society the directors were normally five, but that number might be increased, and each director must be the holder of at least two B shares. The rules provided that a general meeting should be held once a year for the election of directors and for receiving the report, &c. By rule 100, two-thirds of the surplus profits went to the holders of B shares and the remainder was carried to a reserve fund. Excepting so far as they were interested in the solvency and strength of the society the A shareholders had no interest in the profits and no direct share in the management. It will be seen, therefore, that if any question of relative degree of culpability can arise in such a case as this, the B shareholders must be counted to be the most heavily to blame. Being the only class directly interested in the profits, and being the class from which the directors must always be selected, the limitations of the powers of the society ought to have been known to them above all others. Yet the learned judge has decided that in the distribution of assets in the liquidation the holders of B shares are entitled to the full amount of their shares with interest to the date of distribution in priority to any payment being made to the depositors. The hardship and apparent injustice of this are very striking, especially when it is borne in mind that by rule 97 any deficiency due to losses incurred by the society is to be borne by the holders of B shares only. The decision of the learned judge was in his opinion in accordance with decisions in the Court of Appeal and in the House of Lords which were binding on him and are binding upon us, and it is contended by the respondents that this is correct. Inasmuch as we are bound by the law laid down in those cases and they must therefore guide our decision, I shall, without further discussion of the rights of the parties under the special circumstances of the case, proceed particularly to examine those decisions to ascertain the general principles of the law to be applied by us.

The series of decisions of this Court and the House of Lords which establish the legal effect of ultra vires action in

circumstances like the present may, for the purposes of this case, be taken to commence with the case of *In re National Permanent Benefit Building Society.*(1) In that case the directors of a benefit building society which had no power to borrow money borrowed a sum of money for the purpose of advancing it to the members on the security of their shares. It subsequently stopped payment, and the lenders lodged a petition to wind it up as an unregistered company, the debt on which the petition was based being the above advance. The Master of the Rolls made an order upon the petition which upon appeal was set aside by Giffard L.J. on the ground that the transaction being ultra vires created no legal or equitable debt and therefore gave to the petitioner nothing upon which a petition could be founded.

That the law applied by Giffard L.J. in the above case was sound is put beyond controversy by the decision in the House of Lords of the well-known case of *Ashbury Railway Carriage and Iron Co.* v. *Riche.*(2) In that case the plaintiffs, Messrs. Riche, were suing for damages for breach of a contract which was held to be ultra vires of the company, and their Lordships held that, as the company had no powers beyond such as were explicitly or implicitly conferred upon it by the memorandum of association, and the contract was beyond the objects in that memorandum, it was placed beyond the power of the company to make the contract, and therefore it was not only void from the beginning, but was incapable of ratification even though the whole of the individual shareholders sanctioned it. Not even the consensus of all the members of a corporation can add to its corporate powers.

In both the above cases the unsuccessful parties were seeking, in respect of contracts which were void ab initio, the ordinary legal relief to which breach of contract entitles the injured party, and these decisions finally settled that this cannot be given. This is, however, only one of the many questions that arise out of transactions that are ultra vires on the part of a corporation or other body of limited powers. There remain many difficult and important problems in relation to the consequences as between the parties of acts that have been done during and upon the

(1) L. R. 5 Ch. 309.
(2) L. R. 7 H. L. 653.

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faith of the existence of such contracts. Questions of this kind arose in the liquidation of the Guardian Permanent Benefit Building Society. The rules of that building society permitted the trustees or directors to borrow money from time to time as occasion might require and directed that such money should be a first charge on the funds and property of the society. No express limit was prescribed as to the amount of the borrowing, and the Court of Appeal held that this rule was invalid because it purported to give an unlimited power to borrow, and that consequently borrowing was ultra vires of the society. (1) In so deciding the Court supposed itself to be following decisions to a like effect which were binding upon it. Upon appeal to the House of Lords (2) the decision upon this point was reversed. In one of the cases which were before the Court, namely, the *Crace-Calvert Case* (3), the decision was based entirely on this misconception, and accordingly it was reversed without their Lordships pronouncing on the question whether the consequent directions contained in the judgment would have been correct if borrowing had in fact been ultra vires. Nevertheless the mode in which in that case the Court of Appeal directed that the funds of the society should be distributed, on the basis that the borrowing was ultra vires, has been generally regarded as establishing the law applicable to such cases, and it is upon it that the judgment of Neville J. in this case is founded. I am not aware that this part of the judgment of the Court of Appeal in the *Crace-Calvert Case* (3) has ever been accepted by or received the sanction of the House of Lords (or even of the Court of Appeal) in any subsequent case, but the great authority of the judges taking part in the decision rightly gives to it great weight, and whether it is an authority which is technically binding upon us or not it is essential to examine exactly what was decided and the facts upon which it was based.

The applications which were before the Court were of two kinds. The first, of which the *Crace-Calvert Case* (3) was the representative, were in respect of persons claiming to be creditors

(1) *In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440.

(2) 9 App. Cas. 519.

(3) 23 Ch. D. 440.

for moneys borrowed by the society under the unrestricted powers of borrowing as "occasion might require," which purported to be given by rule 52 of the duly certified rules of the society. The second, of which *Scott's Case* (1) was the representative, were by holders of preference shares purporting to be issued under rule 31 who claimed as shareholders for the amounts paid up upon their shares. This rule as appearing in the original printed rules of the society authorized the issue of paid up shares of the value of 30*l.* each upon certificates bearing 5 per cent. interest entitling the holder on due notice to withdraw the whole or part of his deposit in preference to all other shares. This rule was disallowed by the certifying barrister on the formation of the society in 1871 but was nevertheless printed among the rules of the society until the year 1876, when the society applied to alter (amongst others) that rule as follows: "Section 31. Omit 30*l.* and insert 1*l.* in line 3." The barrister certified this amendment apparently forgetting that the rule of which it was an amendment had been disallowed. In consequence of this, those who had taken deposit shares of 30*l.* exchanged them for thirty deposit shares of 1*l.*, and all deposit shares issued thereafter were for the amount of 1*l.* each.

The order to wind up the society was made in November, 1881. With regard to the claims based on money lent to the society the Court decided that as the borrowing was ultra vires it did not create either a legal or equitable debt from the society and that therefore in cases where any security was held by the lender it must be given up to the society because there was no debt to secure. It further held that the outside creditors and the unadvanced members were entitled to be paid in full out of the assets. There still would remain out of the assets of the society a large surplus, as to which Sir George Jessel M.R. in delivering the judgment of the Court said (2): "It is plain that it cannot be said on behalf of the society that the surplus so obtained ought to be retained by the members of the society. It was obtained by their own innocent mistake, because they had passed the rule authorizing the directors to borrow. They advertised for loans,

(1) 23 Ch. D. 453; 9 App. Cas. 519. (2) 23 Ch. D. 451, 452.

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and so obtained the money. It was a mistake common to both sides. The surplus which arises from the advances so made must obviously on the plainest principles of equity be returned to the people who advanced. Nobody can have a claim upon it except those whose money it is." Accordingly the judgment of the Court was that this surplus should be divided pari passu among the creditors who had advanced money to the society. In justification of the payment in full of the claims of the unadvanced members he says: "It cannot be said that the unadvanced members of the society are not to take the assets. They have a right to claim payment out of the assets, and it is impossible to point to any part of those assets as coming from any particular part of the money as distinguished from the rest. Their legal rights must therefore prevail, and they will accordingly be paid in priority to the other persons who would get the surplus."

With regard to the second class of claimants the Court ultimately decided that rule 31 was not ultra vires in its altered form. They would have held, I think, that in its original form it could not have been a valid rule, but it was not necessary to decide that point inasmuch as it never became a rule because it was never certified. But they held that those who had taken deposit shares of the amount of 30*l.* during the time that the rule appeared among the printed rules of the society were entitled to recover their money from the society on the ground that the taking of the shares had been induced by the misrepresentation of the society that such a rule existed. The Master of the Rolls says (1): "The rule gave the public the option of taking 30*l.* shares, and many persons were induced to take shares under it. What is the position of persons who have paid their money for such shares, and whose money went into the coffers of the society? It is tolerably plain that, as between them and the society, the society on winding up must either admit the validity of their shares, or give them back their money. The society cannot say to them: 'We represented to you that there was a rule which entitled us to issue such shares, and we got your money by that representation, but as the rule was not certified we are not liable

(1) 23 Ch. D. 460.

to you in any way.'" Cotton L.J. says (1): "Could it be said that the society is entitled to retain the money received from those who took 30*l.* shares which were taken by them on the representation of the agents of the society, from whom they took the shares, that there was a certified rule authorizing the issue of these shares, when in fact that was entirely inaccurate, and there was no rule authorizing the issue of any such shares? In my opinion, under those circumstances, the takers of those shares would be entitled to recover from the society that money which was obtained by the misrepresentation or by the carelessness or otherwise of those who were the agents, and who got that money from the persons taking the 30*l.* shares." Bowen L.J. says (2): "When you come to people who were induced, as these people were, to lend or to subscribe their money by misrepresentation put before them by the company—although the company has had the money I agree that the directors and not the company would be the persons to be sued for fraud, because the misrepresentation was I suppose the misrepresentation of the directors—the company cannot keep the money which they obtained by the misrepresentation of the directors without doing all that lies in their power to make good the representation. They cannot take the benefit of the misrepresentation and repudiate the act of the directors altogether." This decision was supported on appeal by the House of Lords (3), Lord Blackburn expressly stating that he agreed with the reasons given by the Master of the Rolls.

In the same year there came before the House of Lords the first appeal in the case of *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society.* (4) This case is important historically, though it does not directly affect any matters before us in this case. It arose in the winding up of a benefit building society which had not by its rules any power to borrow. Its bankers had notwithstanding permitted it to overdraw its account. Securities belonging to the society had been deposited with them as security for the overdraft and were in their hands at the date of the winding-up, the amount of the overdraft at

(1) 23 Ch. D. 469.
(2) 23 Ch. D. 470.
(3) Sub nom. *Murray* v. *Scott*, 9 App. Cas. 519, 556.
(4) 9 App. Cas. 857.

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that date being very considerable. The Court of Appeal had held that the overdraft was ultra vires and that the bankers were not creditors of the society in respect of the overdraft. They had, however, directed an account to be taken between the society and its bankers on the basis of the validity of certain claims on behalf of the bankers and allowed the bankers to retain the securities against the balance appearing in their favour on such account. The account having been taken shewed, however, no balance due to them. The only point before the House on the appeal which was brought by the bankers was as to whether they were entitled to claim to be creditors and to hold the securities as such in respect to the overdraft which the appellants contended did not amount to borrowing. The House of Lords decided that allowing the overdraft was equivalent to borrowing and dismissed the appeal.

In 1885 a further application in respect of the same winding-up came before the Court of Appeal.(1) The liquidator claimed that he was entitled to require the bankers to account to him for all sums paid to them by the society and applied by the bankers from time to time in reduction of the overdraft on the ground that, inasmuch as there was no legal or equitable debt to the bankers by reason of the company having no power to borrow, these moneys must be held to be still in their hands as moneys of the society. He succeeded in establishing this claim subject to two qualifications. The bankers were allowed to stand in the place of withdrawing members of the society who had been duly paid out of moneys so advanced by the bankers and also to have the benefit of securities obtained by the society by means of the overdraft allowed by the bankers. But the importance of the decision of the Court for the purposes of the present case is to be found in that part of the judgment of the Court (which was delivered by Cotton L.J.) which deals with the contention of the appellants that the members of the society (which being a benefit society was not a corporation) had ratified the acts of the directors by the fact that they saw and did not question the balance-sheet and accounts which were sent to them from time to time and on

(1) *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.*, 29 Ch. D. 902.

which these loans appeared. The Court decided against this contention of the bankers, holding that the facts proved were insufficient to establish ratification. But he adds by way of reservation (1): "Possibly the bankers may be able to prove that some of the members not only knew of but intended to adopt and ratify the dealings of the directors. This judgment in no way deals with and will not prejudice such claim, if any, as the bankers may be advised to make in respect of any moneys payable to such of the members, or representatives of deceased members, as concurred in the dealings of the directors with the moneys of the company. This is not a question for decision in the present action."

In 1885 the case of *Baroness Wenlock* v. *River Dee Co.* (2) came before the House of Lords. In that case the company, which was a statutable company, had a limited power of borrowing to the extent of 25,000*l.* The appellants represented persons who had advanced to it a very much larger amount and they had recovered judgment in the Court of first instance for the whole on the ground that the company had had the benefit of the money which had been loaned to it in excess of its powers. The Court of Appeal set aside that judgment. The company on the hearing of the appeal admitted the claim of the plaintiffs to the extent of 25,000*l.* and such further sum as they could shew had been applied in payment or discharge of any debts or liabilities of the company, and the Court of Appeal gave judgment in accordance with that admission of liability. The House of Lords sustained this decision. The only point of general law decided was that the law laid down in the case of the *Ashbury Railway Carriage and Iron Co.* v. *Riche* (3) applied to all companies created by any statute for a particular purpose, and not only to companies incorporated under the various Companies Acts. The judgments in the Court of Appeal are to be found in a note in 36 Ch. D. 675, and it is evident that the main consideration which weighed with the Court was that as the company was a corporation it was impossible that acts of the corporate body which were ultra vires could be ratified by any acts of the individual members.

(1) 29 Ch. D. 902, 911. (2) 10 App. Cas. 354.
(3) L. R. 7 H. L. 653.

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In 1899 the case of *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1) came before the Court of Appeal. In that case a company which possessed powers of borrowing limited to the right to issue three classes of debentures possessing certain priorities obtained money from its bankers by way of loan to pay interest due on some of these debentures. The company got into difficulties, a receiver was appointed, and a claim was made on behalf of the bankers that they were entitled to stand in the place of the persons to whom interest had been paid out of the moneys so found by the bankers and thus to be entitled to the same priorities as were enjoyed by them. The Court decided against this claim so far as priorities were concerned, laying down that a person who had lent money to a company that had no power to borrow was entitled so far as the moneys advanced had been applied in discharge of legal debts or liabilities of the company to stand in the same position as if the advance had been a valid one, but that he was entitled to no more.

There are, in addition, decisions of Courts of first instance on similar questions, but they are confessedly based upon the above decisions and I do not propose to deal with them specifically. The learned judge has purported to follow the decision of the Court of Appeal on the claim represented by the *Crace-Calvert Case* (2), to which I have referred above, which was in respect of money borrowed by the Guardian Permanent Benefit Building Society. He recognized that if the money obtained from the depositors could have been traced into the purchase of securities or the payment of liabilities they would, to that extent, have been entitled to relief; but, inasmuch as this was impracticable because no separate account had been kept, he ordered that (after the satisfaction of all legal liabilities, costs, &c.) all shareholders (including of course the B shareholders) should recover the full amount of their shares with interest, and that the residue of the assets should be divided pari passu among the depositors.

The decision of the learned judge does not, to my mind, accord with the conclusions that ought to be drawn from the cases. In my opinion, sufficient importance has not been given to the

(1) [1899] 1 Ch. 440 (2) 23 Ch. D. 440.

decision in the Court of Appeal in *Scott's Case* (1), which was approved of by the House of Lords. It shews clearly that even in the case of an ultra vires transaction which can give rise to no debt, either legal or equitable, the Court does not necessarily as between the parties to that transaction permit a party to enjoy the proceeds of the transaction merely because he happens to possess them. As between those two parties it can and will do justice and will for that purpose examine into the transaction. That this is involved in the decision is evident. The Court decided that the owners of the 30*l.* deposit notes were, in the winding-up, entitled as against the members of the society to be repaid their deposits, because the society by printing the invalid rule had represented that it had power to issue such deposit notes and the subscriptions had been obtained through this misrepresentation. But those considerations did not in any way affect the ultra vires character of the transaction. Suppose that a company were to print incorrectly its memorandum of association so as to make its powers appear wider than in fact they were. No one can doubt that transactions thus brought apparently within the scope of the company's memorandum would be ultra vires and would give rise to no legal or equitable debt. The decision in *Scott's Case* (2) shews that nevertheless the company would in the winding-up be obliged to rectify the wrong done before its members could divide the assets. It could not be allowed to keep that which was obtained wrongfully by its agents.

In *Scott's Case* (2) the wrongful act of the agents was a misrepresentation as to the powers of the company, but, in my opinion, the principle on which the Court acted is not limited to such cases. The language of Cotton L.J. is quite general. He applies it to "money which was obtained by the misrepresentation or by the carelessness or otherwise of those who were the agents." It is clear that the Court were of opinion that wherever it can be shewn that the assets of the society have been swollen by sums wrongfully obtained by the improper acts of its agents the claim of those from whom the money has been obtained must be satisfied before the assets in the possession of the society can be

(1) 23 Ch. D. 453; 9 App. Cas. 519. (2) 23 Ch. D. 453, 469.

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treated as belonging to it for the purpose of payments to its own members or division among them. Such a principle is obviously just. To act on any other principle would be to put a huge premium upon a company acting ultra vires, for it would enable it to acquire assets for the benefit of its members without the obligation or even the power to give consideration for them.

Take, for example, the case we have before us. Banking was outside the powers of the society and consequently the acceptance of deposits by the society did not create a legal or an equitable debt. According to the cases that have purported to follow the decision in the *Crace-Calvert Case* (1) the repayment of a deposit in such a case is an invalid transaction because it purports to be in discharge of a debt and that debt does not exist in law or equity. It therefore follows that every payment to a customer of the bank (including the payment of every cheque drawn upon the bank by a depositor) must be refunded by him. But this is not all. In considering the apportionment of the huge accumulation of assets thereby acquired the decision in the *Crace-Calvert Case* (1) is interpreted as meaning that the claims of the members of the society in respect of their shares are first to be satisfied out of the assets and that the derelict remainder after this has been done is all that can be divided among those who have made deposits. This is on the ground that all that is in the possession of the society must be treated as legally belonging to it; and that the claims of the shareholders are legal claims and must therefore be preferred. If this reasoning be sound, it must go to the extent of satisfying all the claims that the shareholders could legally have made against the assets if in fact they had been rightfully acquired. Now the B shareholders are entitled to all the profits of the society and their right to profits is just as much a legal claim as is their right to repayment of the amount of their shares and interest thereon. It follows, therefore, that if the principle of that decision be accepted the whole of the deposits in the bank together with the whole of the payments made in past time to depositors (when recovered from them in the liquidation) would be divisible among the twenty-eight B shareholders, who necessarily include the whole of the directors of the

(1) 23 Ch. D. 440.

society who have been primarily and directly the instruments of the wrong-doing. That the Courts are called upon to accept principles that could lead to such a huge premium on wrong-doing is a thing I cannot believe.

The learned judge has refused to give to the B shareholders any profits, and the counsel appearing on their behalf before us have been careful not to ask for any, as it would make too evident the true effect and the logical consequences of the propositions they ask us to accept. But their so doing does not alter the fact that if we are to follow the interpretation of the decisions which is put forward by them we are committing the Court to sanctioning legal principles which logically and necessarily lead to these monstrous consequences.

I decline to accept these principles as being those which are binding upon us, and considering the decisions as a whole, I find no difficulty in arriving at a very different but perfectly consistent theory of the rights of the parties in cases where transactions have taken place which, though in every respect bona fide, are ultra vires as to one of the parties. I agree that it is unquestionably good law that contracts of that kind are void from the commencement. They cannot be enforced either in law or equity, and they give rise to no legal or equitable debt. But even here it is a mistake to suppose that the law entirely refuses to regulate the consequences and leaves the parties to keep what they have respectively got hold of without regard to justice as might be the case if the contracts were immoral—true turpes causæ. The very invalidity of the contract may give rise to rights which the law will enforce or defend. Thus if a company had purported to purchase a railway by an ultra vires contract and was seeking to recover the money paid as money paid by agents without authority, the Courts would not permit it to recover the money and still keep the railway. The incapacity to purchase would bring with it an incapacity to acquire the property, and therefore the railway would not belong to them. To hold otherwise would be to establish that corporations could not suffer, but might profit by ultra vires transactions—a doctrine the effect of which would be most pernicious and which would rest on no sound principle of law or equity.

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But in the present case we have not to consider the problems that arise while the company is still carrying on business, but only the far less difficult questions that arise in a liquidation. Inasmuch as the society has ceased to carry on business, the totality of its legal liabilities can be ascertained, and these must undoubtedly be satisfied before any question can arise as to the rights of shareholders or of those who have in fact contributed to the assets of the society, but have done so under circumstances which do not create any legal or equitable debt from the society. In the present case these liabilities have already been discharged. The Court has therefore to adjudicate only as to the rival claims of two classes, namely, those who are members of the body that has transgressed the limits of its powers, and those from whom it has acquired property by reason of those ultra vires transactions. Here it is more free to do justice, and the principles to be followed are, in my opinion, that the society must first of all restore that of which it has become possessed through the legal misconduct of its agents. This is established by the decision in *Scott's Case.* (1) When this has been done as far as is practicable, so that the assets have been purged of that which rightfully ought not to be there, the principle of ultimate division adopted by the Court in the *Crace-Calvert Case* (2) comes in. The members' claims are to be satisfied, and, if there are any remaining assets, they must be divided among those sufferers whose losses have not been remediable by the process of restoration of illegally acquired property. It will be seen that in this way both decisions of the Court of Appeal in the cases arising out of the liquidation of the Guardian Permanent Benefit Building Society are followed. They represent two distinct stages in the process of distribution. The assets are first to be purged by restitution where possible; then the claims of the members in respect of their interest in the society are to be dealt with as being legal claims on the purged assets, and then the derelict remainder is to go towards meeting the claims that are still unsatisfied. It is not necessary to consider whether the Court realized that this was the position of the two decisions or whether the language used in those two

(1) 23 Ch. D. 453; 9 App. Cas. 519. (2) 23 Ch. D. 440.

decisions can in all respects be reconciled. The equity of restitution between the parties as a preliminary to the ultimate distribution by division is clearly enunciated in the decision in *Scott's Case* (1), which was approved by the House of Lords, and it is so markedly wise and just that I have no hesitation in holding that it ought to be applied where practicable. It is incomparably fairer in its operation and more in consonance with the fundamental aim of our systems both of law and equity,—namely, to prevent a man profiting by his own wrong—and therefore it must be regarded as more acceptable to the Court than the ultimate plan of distribution in the *Crace-Calvert Case* (2), which is, after all, little more than a counsel of despair.

It remains to apply these principles to the facts of the present case, which illustrate very forcibly their soundness. For half a century the society has, by its agents, openly carried on this banking business. It has unquestionably been ultra vires on its part so to do, but I unhesitatingly come to the conclusion that none of the customers, nor, I should trust, the members or directors of the society, were aware that it was so. By these means the society has obtained these huge deposits. The conduct of the society in openly carrying on the bank and permitting its agents to receive deposits was a representation to the world, both by the society and its agents, that it had the power so to do, and although this did not give validity to the transactions or cause them to create legal or equitable debts, yet, as between the parties to the transactions, the makers of the deposits would be (to use the language of Cotton L.J. in *Scott's Case* (3)) "entitled to recover from the society that money which was obtained by the misrepresentation or by the carelessness or otherwise of those who were the agents." The society cannot be allowed to profit by its own wrong-doing. The claims of the depositors to a return of their money have, therefore, priority over the claims of the members to a return of the amount of their shares. These latter claims will be effective only against such portion, if any, of the assets as remain when they have been purged of that which the society through its agents obtained wrongfully.

(1) 23 Ch. D. 453; 9 App. Cas. 519. (2) 23 Ch. D. 440.
(3) 23 Ch. D. 469.

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And while I base this decision on exact legal and equitable principles duly laid down by the Courts, I do not think it immaterial to consider the result of the decision from the point of view of general equity. It is bad enough that people—in this case mainly small investors from such a class in life that they must almost necessarily have been ignorant of and incapable of appreciating the fine legal distinctions on which the doctrine of ultra vires rests—should find that in the eye of the law the well-known bank to which they trusted their savings is not a bank at all and that from the first the society had no warrant for carrying it on. But to learn that as a consequence of this the members and directors of that society (who were the guilty parties) are entitled to have their claims paid to the last penny out of the money thus obtained from the depositors must shock the public conscience. If it be necessary so to decide in order to uphold the law and secure it from being violated, we must do so. But principles which tend to make ultra vires acts safe and possibly profitable to the offending societies are not adapted to prevent violations of the law. That the Court should content itself with regarding possession only and should shut its eyes to all the mischief and injustice that would thus be made to follow from these bona fide mistakes—errors no doubt, but innocent errors as to legal status and powers—would, in my opinion, be a cowardly as well as a cruel policy—one that should not be adopted unless the Court has no choice but to accept it. And this is not so. On the principles laid down by the Court of Appeal in *Scott's Case* (1) and supported by the House of Lords it can go far in mitigating the wrong which would otherwise be done, and this is effected by applying sound and recognized principles of equity without in any way failing scrupulously to enforce the restrictions imposed by law on companies or societies of its own creation. I welcome these principles, therefore, not only as being sound in law, but as tending to do justice.

I am, therefore, of opinion that this appeal should be allowed and that the Court should declare that the depositors are entitled to a return of their deposits in priority to any payment to the holders of B shares. This renders it unnecessary for me to

(1) 23 Ch. D. 453; 9 App. Cas. 519.

consider any question as to the existence or effect of ratification by the individual holders of the B shares or any of them or as to whether any such questions can be raised in this proceeding, and my decision is wholly without prejudice to any such contentions wherever and whenever raised.

BUCKLEY L.J. This is a building society whose objects as defined in rule 2 are the ordinary objects of a building society. It went far beyond those objects, and carried on the business of banking. That was ultra vires. It is now in liquidation. The assets are insufficient. The order under appeal is one which affirms that the unadvanced members are entitled to have 20*s.* in the pound and bonus and interest up to the time of actual payment, and that the banking creditors can take no more than a dividend out of the balance of the assets which then remain. The question for decision is whether this is right.

Upon the statement of fact above made that this society went far beyond its objects and carried on the business of banking, the facts so plainly establish it that I shall not discuss them at any length. There were not two societies, the one carrying on the business of a building society, and the other that of banking. There was only one society, but its undertaking included the business of banking as a branch or department carried on concurrently with but largely independent of the building society business. That portion of the undertaking was described as a bank. Every document which was used for the purpose of that branch of the undertaking so described it. It opened current accounts and deposit accounts, and in every essential particular, nay, more, I think I may say in every particular, it did that which a banker does in the course of a banking business, and offered its customers all such facilities as a bank commonly offers. It took a pride in stating that it occupied a foremost place among the joint stock banks of London. Its customers were told in sending in cheques to the bank to cross them "Birkbeck Bank." This is, in my judgment, significant as shewing that by the authority of this society the paying banker was told that he was to pay only through another bank, and that was the Birkbeck Bank. The shareholders—that

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is the building society members—were in 1910, according to the report for that year, in number 19,666. The depositors, by which is meant the bank customers, were 93,151. The amount subscribed by members at the same date was a little over a million pounds, while the amount due to the banking customers was ten millions and three-quarters. These short facts are sufficient, in my judgment, as a summary of the facts by which I find it plainly established that the business of banking as an independent and substantial business, not merely ancillary to or in aid of the building society business, was carried on by this society.

Such business of banking was ultra vires. It was not authorized by any rule, unless it is rule 35, and if that rule was one which made the society a bank, then, in the words of Giffard L.J. in *Laing* v. *Reed* (1), the rule was repugnant to the Act, for it made the society a thing different from that which is specified in the Act and meant by the Act. The test is whether the rule makes the society a thing different from a benefit building society or merely provides a method of conducting the proper business of a building society: *Murray* v. *Scott.* (2) In this society if the rule be relied on it unquestionably did the former.

From the fact that the society was carrying on such an ultra vires business there may result consequences of two different kinds. The first, and that with which we have here to do, is the consequence to the persons who as depositors contracted with the society in that business. The other, with which we have nothing here to do, is the consequence as between the members of the society, on the one hand, and the directors or agents who in fact conducted it, on the other. Upon the latter I say nothing; it is not matter for consideration before us. In leaving it I only say that it does not follow that the consequences in the two cases are to be determined by the same considerations. As between the members and the directors there may be many relevant facts with which upon this application we are not concerned.

There is another respect in which the matters here to be

(1) L. R. 5 Ch. 4, 9.

(2) 9 App. Cas. 537.

decided must be limited. This is a representative case, and all that we have to do is to determine as between the banking creditors as a class and the assets of the society in liquidation what are the rights. If it was ultra vires to contract banking debts by the receipt of deposits in carrying on a banking business, it does not follow that every receipt of money on deposit was necessarily ultra vires. If any depositor accepted and discharged the onus of shewing that the particular borrowing from him upon which the deposit was made was one legitimately for the purposes of the building society business, there might be a good debt none the less because the transaction was carried out through what was called a bank. But it does result, I think, that the onus is thrown upon such depositor to prove that for reasons applicable to that particular case he has rights differing from those which are prima facie the rights of the banking creditors.

It is impossible, when the figures in the present case are looked at, to say that the position of the depositors in this case can be prima facie that of legitimate lenders to the building society. Mr. Buckmaster has sought to argue that a building society with a legal power to borrow for the purposes of its building society business may lawfully borrow upon loan repayable on demand, and that if it does so and employs the money in ordinary building society mortgages to members, it must be prepared for the event of the lender demanding repayment at short notice, and that consequently, if it borrows, say, 100,000*l.* repayable on demand for the purpose of lending it on mortgages, it must have a large margin of moneys repayable on demand to cover the average number of demands for repayment that may be made. This contention, I think, is inadmissible. A building society cannot legally borrow on such terms as that, for safety, it must carry on the business of a bank. Assuming, however, that the contention in the general form were admissible, the facts will not support the theory that the contention fits the present case. If I refer, again by way of illustration, to the balance-sheet of 1910, I find that the mortgages and loans amounted to 713,000*l.*, being about three-fourths of the subscriptions of the members, and that the banking deposits amounted to ten and three-quarter millions, and, further, that this enormous sum, as

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one would anticipate, was not kept in hand or at short demand with a view to meeting the possibility of short demand by depositors. Eight millions and three-quarters had been placed in investments which were not liquid assets and not presently available. The amount presently available was a little over a million. Under these circumstances it is idle to say that the amount received on deposit was legitimately borrowed to cover the contingency that moneys bona fide borrowed for the purpose of lending on mortgages might be demanded at short notice. Again, by way of further instance upon the same balance-sheet, it appears that during the year 75,000*l.* had been advanced on mortgage and 109,000*l.* repaid, so that no money at all was wanted during the year for advance on mortgage. But nevertheless the society received on deposit during the year sixteen and a quarter millions. Money to the extent of over sixteen millions was received in deposits and repaid in deposits during the year.

Upon these facts it is abundantly plain that this banking business was not incidental to or for the purpose of the building society in any degree, or, at any rate, in any but the very smallest degree. It was an additional independent ultra vires business.

The rule upon which, if at all, the receipt of moneys by the bank could be justified is rule 35. That rule either did authorize a banking business or it did not. If it did, then the rule itself was ultra vires, for this society could not within its legal objects carry on such a business. If it did not, then the banking business was ultra vires. In either alternative, therefore, the business was ultra vires. Another argument was advanced in support of the contention that rule 35 was ultra vires based upon Lord Selborne's language in *Murray* v. *Scott.* (1) Lord Selborne there pointed out that a building society rule giving power to borrow cannot extend to enable the directors to pledge the credit of the individual members without limit in a manner inconsistent with the limitation of the amount of their shares. If I rightly understand his language, it was addressed to the case where the directors were pledging the credit of the members to the creditors of the society, and not to the case in which as between the members inter se one class was to the indemnity of another

(1) 9 App. Cas. 538.

class to make good the deficiency of a fund. *In re Mutual Aid Permanent Benefit Building Society* (1) is another case in which the point arose and in which Lord Selborne's language was understood in the sense in which I understand it. Rule 97, on which Mr. Upjohn relied for the purpose of this contention, is not one which enables the directors to pledge the credit of the members to the creditors. It is a rule which creates a fund and throws upon that fund amongst other things the society's losses, and then provides that the deficiency, if any, of the fund shall be borne by certain members in proportion to their shares. This, I think, means shall be borne by those members to the indemnity of other members. Rule 97, therefore, does not assist me in determining the question, and, even if it were more material than I think it to be, it seems to me that, as in *In re Mutual Aid Permanent Benefit Building Society* (1), that rule might be rejected, leaving the borrowing power unaffected. I, therefore, rest my opinion that the banking business was ultra vires upon the grounds stated earlier in this judgment.

It remains to determine the law applicable to the above facts. Where an association having no borrowing power receives money by way of loan or advance, the following propositions have by decisions which bind this Court been determined to be true. (I.) If the result of the transaction is that the indebtedness of the association is not increased because the new loan is applied in discharging an old debt, then it is not to be regarded as a borrowing transaction, for the invalid lender can be treated as standing in the place of those whose debts have been paid off: *In re Cork and Youghal Ry. Co.* (2); *In re Wrexham, Mold and Connah's Quay Ry. Co.* (3) (II.) The same doctrine is applicable even when the loan is applied in discharging not an old debt but a future debt: *Baroness Wenlock* v. *River Dee Co.* (4) This proposition cannot rest, as the first may, upon the ground that there being no greater indebtedness there is no borrowing. For there is greater indebtedness. The ground here must be that the association could legally become indebted in respect of the future

(1) 30 Ch. D. 434.
(2) L. R. 4 Ch. 748, 761.
(3) [1899] 1 Ch. 440.
(4) 19 Q. B. D. 155.

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debt, and the lender whose money discharged it could be subrogated to the rights of that creditor. The doctrine of subrogation is, however, upon the authorities not applicable in its integrity, for the lender does not obtain the benefit of the securities held by the creditor to whose position he is subrogated: *In re Wrexham, Mold and Connah's Quay Ry. Co.* (1) (III.) If the lender can identify his money or the investment of his money in the hands of the borrower he can call for its return. In such case he is entitled to what is commonly called a tracing judgment; but (IV.) If the lender cannot bring himself within any of the above propositions, then he is a person who is unable as against the borrower to affirm that he holds a debt, either legal or equitable. Neither in a Court of law nor in a Court of Equity can he affirm that he is a creditor—*In re Guardian Permanent Benefit Building Society* (2)—or entitled to such a right or claim as would support a winding-up petition: *In re National Permanent Benefit Building Society.* (3) Nevertheless (V.) and lastly, when all the members of the borrowing association have received 20*s.* in the pound upon their shares, the surplus, if any, is, according to the decision in *In re Guardian Permanent Benefit Building Society* (2), divisible among the ultra vires creditors rateably.

In the present case the society had no borrowing power, in the sense that rule 35 was not available for the purposes for which it was used. In dealing with this branch of the law it is necessary to bear steadily in mind the difference between illegality and ultra vires. A transaction which is illegal is forbidden by law. A transaction which is ultra vires is precluded by the incompetence of the actor. The act may be a perfectly legal act, but is one which that person cannot do. Upon an illegal transaction no right enforceable in a Court of justice can be maintained. But there is nothing to preclude a party coming into Court affirming the existence of an ultra vires transaction and pointing to the incompetence of the party to bind himself thereto. Upon this view of the matter an argument has been strongly pressed upon us—that where money is advanced by

(1) [1899] 1 Ch. 440. (2) 23 Ch. D. 440, 451,
(3) L. R. 5 Ch. 309.

way of loan to an association which cannot borrow there is nothing to prevent an action for money had and received upon the footing of a total failure of consideration. I decline to pronounce any opinion of my own upon this question upon principle. If the proposition is true, numerous cases which bind this Court must have been decided by judges of the greatest eminence in forgetfulness or ignorance of that which would have been a complete justification of a claim which failed. If the proposition be true, it is immaterial whether the borrower had or had not power to borrow; it would have been unnecessary to determine that there resulted no legal or equitable debt, and those authorities by which the lender was remitted to a claim to subrogation or a claim to a tracing judgment were idly decided, for he might have come for a larger remedy by way of action for money had and received. The legitimate use of all decisions is to seek the principle involved in them and to apply that principle to new circumstances. As a rule it follows that if the seeker does not find a principle he is not bound by the decision. But there may come a point at which, although a principle has not been expressly laid down and the existence of the principle itself may be difficult to establish by a course of reasoning, yet decisions which can only be justified if the principle does exist are so numerous that it is no longer possible to say that its existence can be denied. That seems to me to be the position in which a judge, sitting in this Court at any rate, must allow that he is placed in regard to the question whether in such a case as the present an action will lie for money had and received. Sitting in this Court I am bound, whatever my own view may be, to say that under such circumstances as the present an action for money had and received will not lie.

In *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks & Co.* (1) the result of the facts was that money which had been improperly borrowed from the bankers had in fact been repaid in account, and notwithstanding that fact the society were held to be entitled to recover those moneys from the bankers. The alleged debtor had, therefore, in account repaid the alleged creditor, but in this Court it was held that repayment, which was

(1) 29 Ch. D. 902.

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something larger than confession of debt, left the bankers still liable to an action for the money. There are, further, two authorities, neither of them, it is true, binding upon this Court, which go still further and decide that even where the society which has borrowed without power so to do, but which subsequently acquires power so to do, then confesses its indebtedness and becomes bound to the alleged creditor to repay him, such a new obligation is in itself invalid: *Ex parte Watson* (1); *In re Bottomgate Industrial Co-operative Society.* (2)

For the purpose of the decision of the present case it is not, I think, necessary to decide that a society which has borrowed, having no power so to do, cannot under any circumstances be honest and repay, or confess its indebtedness in respect of the money which it has in fact received. But the authorities certainly go far to support the proposition which is laid down in so many words in *In re Guardian Permanent Benefit Building Society* (3) and *In re National Permanent Benefit Building Society* (4) that there is under such circumstances no debt.

I confess myself unable to say what was the plain principle of equity to which Sir George Jessel referred in *In re Guardian Permanent Benefit Building Society* (3) under which the surplus after giving 20*s.* in the pound to the members belongs to the improper lenders. The moneys lent either are or are not assets of the society, and the lenders either are or are not creditors or entitled in some form of action to claim repayment. If the moneys are assets of the society, and the lenders are not creditors, then in the liquidation of the society each member is entitled to his proportionate part in the distribution of the assets amongst the members, and such right is not confined to 20*s.* in the pound upon his shares. Further, if at the time when the loan was made the assets were sufficient only to give the members 10*s.* in the pound, I can see no principle upon which the members are to have another 10*s.* out of the moneys lent and are not to have their share of any surplus then remaining. If they are to have a further 10*s.* out of the money lent, then I see no principle upon which they are not to have such further sum as is the

(1) 21 Q. B. D. 301.
(2) 65 L. T. 712.
(3) 23 Ch. D. 440.
(4) L. R. 5 Ch. 309.

proportionate share of each member of the total sum. If, on the other hand, the lenders are creditors, then they come before the members and the members can take no part in the assets until the obligation towards the creditors has been discharged. I am glad, however, that it is not necessary for me to say what was the equity in *In re Guardian Permanent Benefit Building Society* (1), or whether that case was rightly decided or not, if it were (which it is not) competent to me to review it. There is no cross-appeal in this case. The members are not here claiming to divide the whole assets proportionately among them. The only question is whether the creditors are to come before them. If they are not, then upon the present appeal we may assume that the order so far as it gives the creditors the surplus is right. It results, therefore, that the only point for decision is whether the creditors, setting up no right to subrogation or to tracing, are entitled to put forward a claim to have payment out of the assets of the amounts which they advanced. Upon the authorities as they stand, and upon the footing that it is not open to me to say that an action for money had and received will lie, I cannot escape the conclusion that to the extent of at least 20*s.* in the pound upon their shares the members must receive payment before the banking creditors can claim. There might be a subsidiary point as to whether the order is right as to giving them also bonus and interest to the date of repayment, but that seems to have been the form of the order in *In re Guardian Permanent Benefit Building Society* (1), and in this respect I think the order ought not to be disturbed.

The result is that in my judgment this appeal must be dismissed. I agree with the order proposed by the Master of the Rolls as to costs.

Solicitors: *Burton, Yeates & Hart; Nunn, Popham & Starkie; Lewis & Yglesias; Ashurst, Morris, Crisp & Co.; Rubinstein, Nash & Co.; R. Vaughan; Freshfields.*

(1) 23 Ch. D. 440.

W. I. C.

SWINFEN EADY J.

1912

May 17.

PENNINGTON *v.* CAYLEY.

[1905 P. 689.]

Practice—Foreclosure Action—Plaintiff Trustees—Change of Trustees after Foreclosure Absolute—Opening Foreclosure—Revivor—Adding Parties—Notice of Intention to proceed—Application to set aside Proceedings for Irregularity—Rules of the Supreme Court, 1883, *Order* XVII., *rr.* 1, 4; *Order* LXIV., *r.* 13; *Order* LXX., *r.* 3.

In a foreclosure action brought by the public officer and estate trustees of an insurance society a final order for foreclosure absolute was made on December 3, 1907. Two of the trustees died after that date. New trustees had been appointed in their places and the mortgaged estates vested in them. W., one of the defendants, being desirous of making an application to open the foreclosure, presented a petition of course for an order of revivor, and an order was made in chambers that the action should for the future be carried on between W. as plaintiff and the surviving defendants and the new trustees as defendants:—

Held, on motion to discharge this order, that there could not be a revivor under the modern practice, and the right course would have been for W. to apply to the trustees for their consent to the new trustees being added as plaintiffs, and, if they refused, to apply under Order XVII., r. 4, to have them added as defendants. The order was discharged.

By an indenture of mortgage dated December 6, 1900, Sir George Cayley mortgaged a policy of insurance on his life for 5000*l.* and his life estate in certain hereditaments to the estate trustees of the Legal and General Life Assurance Society for 4500*l.*, and Lord Wharncliffe joined in the covenant to pay principal, interest, and costs. By another indenture dated February 10, 1904, Sir George Cayley mortgaged a policy on his life for 55,000*l.* and his life interest in large estates for 50,000*l.* to the same trustees.

On April 3, 1905, Richard Pennington, the public officer of the assurance society, and the estate trustees, who were then Sir Arthur Kekewich, Judge Bacon, the said Richard Pennington, and William Williams, commenced an action against Sir George Cayley and subsequent incumbrancers for foreclosure of both mortgages. Lord Wharncliffe was not at first a party, but he

was added as a defendant in pursuance of an agreement with the assurance society in order that he might have an opportunity of redeeming both mortgages. Lord Wharncliffe put in no defence; the usual foreclosure decree nisi was made on June 20, 1906, and the foreclosure was made absolute on December 3, 1907.

In March, 1912, Lord Wharncliffe took out a summons to open the foreclosure. All the original plaintiffs were then dead. Two had died before the order for foreclosure absolute, and two, Richard Pennington and Judge Bacon, since that date. New trustees had been appointed in place of all the original plaintiffs, and the mortgaged premises vested in the new and continuing trustees by registered memorials under the assurance society's private Act. The new trustees appointed in place of the two trustees who died before the final order had been added as plaintiffs by orders to carry on proceedings, but no such orders had been made in the cases of Robert Younger, K.C., and C. P. Johnson, who had been appointed trustees and public officer in the places of Judge Bacon and Richard Pennington.

The persons in whom the mortgaged estates were vested were therefore not before the Court and the summons was adjourned. Lord Wharncliffe then presented a petition of course for revivor of the action, and an order was made in the following form :—

"Upon the petition of the defendant the Right Honourable Francis John Earl of Wharncliffe this day preferred unto this Court It was alleged that this is an action for foreclosure. That on the 3rd day of December 1907 a final order for foreclosure was made whereby it was declared that the defendants should stand absolutely debarred and foreclosed from all right title and equity of redemption of in and to the mortgaged hereditaments. That by a memorial dated the 13th day of June 1911 and duly enrolled in accordance with the Legal and General Life Assurance Society's Act 1878 in the Central Office of the Supreme Court on the 14th day of June 1911 it appears that Charles Plumtre Johnson is the present public officer and that the Honourable Sir Henry Bargrave Deane Robert Younger K.C. the said Charles Plumtre Johnson and Romer Williams are the present estate trustees of the said Legal and General Life

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Assurance Society. That the petitioner is desirous notwithstanding the said order dated the 3rd day of December 1907 of reopening the foreclosure proceedings in this action and of continuing the same. That application has been made to the Legal and General Life Assurance Society to present a petition by the society for the purpose of reviving this action by substituting the names of the present public officer and estate trustees thereof but they have declined to do so. It was therefore prayed and it is accordingly ordered that all further proceedings in this action be carried on between the petitioner as plaintiff and the remaining defendants and Charles Plumtre Johnson the present public officer of the society and the said Sir Henry Bargrave Deane Robert Younger K.C. Charles Plumtre Johnson and Romer Williams the present estate trustees of the said Legal and General Life Assurance Society as defendants."

Lord Wharncliffe on April 29 gave the assurance society a month's notice of his intention to proceed under Order LXIV., r. 13. (1) The assurance society now moved to discharge the order as irregular.

C. E. Bovill, for the motion. The order made seems to have followed the old practice and to be an order for revivor, but there cannot be an order for revivor now that there is no abatement. Although foreclosure is called absolute after the final order it is never really absolute, for it can be opened on a proper case being made, and therefore the action is continuing. *Campbell* v. *Holyland* (2) shews that Order XVII., r. 1, only applies when the cause of action continues in persons before the Court. Lord Wharncliffe's proper course was to apply under Order XVII., r. 4, to have the new trustees added as parties; they could not have been made plaintiffs without their consent, but if they did not consent they could be added as defendants. Lord Wharncliffe has now given notice to proceed under Order LXIV., r. 13, which requires a month's notice before any proceeding is taken in an

(1) Order LXIV., r. 13: "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed."

(2) (1877) 7 Ch. D. 166.

action in which there has been no proceeding for a year, but if that is necessary now it was necessary before presenting the petition of course. There is no statement in the petition that it is necessary or desirable to add parties.

Hon. Frank Russell, K.C., and *Stokes*, for the respondent. The proceedings are proper proceedings in the foreclosure action; the proceedings are stopped by the fact that the persons in whom the legal estate is vested are not before the Court. New plaintiffs cannot be added except by plaintiffs and with their own consent. If the defendant is entitled to open the foreclosure there must be some way of setting the record right. Under the old practice it was held that plaintiffs and defendants are all "actors" after decree in an administration action. And a new plaintiff could be added on the application of a defendant: *Burney* v. *Morgan*. (1)

On the suggestion of the judge the parties then consented to the order stated in the judgment.

SWINFEN EADY J. This is a motion to discharge an order of course for irregularity. Under the present practice there is no abatement where, as in this case, the cause of action survives to continuing plaintiffs. Owing to changes in the estate trustees of the Legal and General Life Assurance Society, there has been a change in the persons from time to time entitled to the property, but on an appointment of new estate trustees, and the enrolment of a memorial, the property vests in the estate trustees for the time being. There has been, in my opinion, a change or transmission of interest within Order XVII., r. 4, by reason of an event occurring after the commencement of a cause or matter. The proper way of proceeding would have been by an application under Order XVII., r. 4. What has taken place is that the respondent to this motion, Lord Wharncliffe, has followed the old practice, and taken proceedings in the nature of revivor, and on an ex parte application obtained an order to carry on proceedings, making himself the sole plaintiff, and making the two remaining plaintiffs defendants, and adding fresh persons as defendants. In my opinion that was wrong. An order should have been obtained under Order XVII., r. 4, and if the new

(1) (1823) 1 S. & S. 358.

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trustees did not consent to be co-plaintiffs they should have been joined as defendants. Then a month's notice has been given of an intention to proceed, and the present application is to set aside the month's notice also, the objection to that being that it is given in the action as constituted under the irregular order of revivor. The proper course will be to discharge the order and set aside the notice, but the applicants are willing, on that order being made, to treat the record as amended, by adding Mr. Johnson, the public officer, and the other new estate trustee of the Legal and General Life Assurance Society as co-plaintiffs with the continuing estate trustees, and they are also willing to accept the month's notice of intention as if it were given in the action with the proper title which will now be duly constituted, and as if it had been given on the day when it was, in fact, given, namely, April 29.

Under those circumstances it only remains for me to deal with the costs. The respondent was willing to consent that the costs of this application should be part of the costs upon an application which he intends to make to open the foreclosure, and to be dealt with as part of those costs; and upon such an application being made, I am willing, and will make an order, that the costs be dealt with as part of the costs of that application. If the application is not made the respondent will pay the costs.

It was contended by the applicants that the strict order should be made, and that the respondent should pay the costs, but although the applicants are proceeding in a great measure on a technicality, there was one little fact they had overlooked, namely, that under Order LXX., r. 3, on an application to set aside proceedings for irregularity, the several objections intended to be insisted upon should be stated in the summons, or notice of motion. On perusing the notice of motion I do not find any such statement. I think the applicants are well advised in saying that they consent to the costs of this application being made costs in Lord Wharncliffe's intended application.

Solicitors: *Lawrence, Graham & Co.; Kennedy, Ponsonby, Ryde & Co.*

J. R. B.

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[1912 H. 140.]

Will — Construction — Charitable Legacies — Will made after Mortmain and Charitable Uses Act, 1891*—Usual Direction for Payment in use prior to that Act—Effect of—Direction to pay certain Legacies "after payment" of others—Priority of Payment.*

Testator by his will, made after the passing of the Mortmain and Charitable Uses Act, 1891, gave his real and personal estate to trustees upon trusts for sale and conversion, and out of the proceeds "in the first place" to pay all expenses incident to the execution of the trusts and powers of his will and his debts and funeral and testamentary expenses; and "in the next place" to pay a legacy of 500*l.* free of duty to each of seven named nephews, and "after payment thereof" to pay a legacy of 1000*l.* to each of nine named nieces, with a substitutional gift to their children in case any of them should die in his lifetime. He then bequeathed certain other legacies, including eleven charitable legacies, and directed these charitable legacies "to be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes and in preference to any other payments thereout." The testator's estate comprised real and leasehold property and impure personalty:—

Held, that the direction as to the payment of the charitable legacies must be read as a direction to pay them out of the whole personal estate (including leasehold property) not specifically bequeathed, to the exclusion of the real estate, but in priority, so far as the personal estate went, to all other payments thereout.

In re Bridger [1894] 1 Ch. 297, applied.

Held, also, that the legacies bequeathed to the nephews were not entitled to priority over the legacies bequeathed to the nieces.

Thwaites v. *Foreman* (1844) 1 Coll. 409, followed.

William Harris, a retired solicitor, by his will, dated November 11, 1902, after making certain specific bequests, including a bequest of a leasehold house to his sister during her life, devised and bequeathed his residuary real and personal estate to trustees "Upon trust to sell and convert into money my said residuary real and personal estates or such parts thereof as shall be of a saleable or convertible nature and to get in the other parts thereof. I direct my said trustees thereout in the first place to pay or retain all the expenses incidental to the execution of the

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preceding trusts and powers and my debts and funeral and testamentary expenses and in the next place to pay my nephews the said Joseph Montague Harris William Cecil Harris and Henry Blackwall Harris (sons of my late brother the Reverend Joseph Harris) Alexander Joseph Harris and Frederick William Harris sons of my dear brother Samuel Harris and the said Trevor Basil Woodd and Charles Hampden Basil Woodd (sons of my sister Jane Woodd) the legacy or sum of five hundred pounds each free of duty, and after payment thereof to pay the legacy or sum of one thousand pounds to each of my nieces, namely Mary Louisa Harris and Mildred Susan Fox (daughters of my late dear brother Joseph Harris) Margaret Eleanor Isaacs Constance Mary Harris Edith Georgina Harris Beatrice Louisa Harris and Dorothy Grace Harris (daughters of my dear brother Samuel Harris) Gertrude Jane Woodd and Ethel Grace Woodd (daughters of my sister Jane Woodd). And I declare that if any of my said nieces shall die in my lifetime and any child or children of such niece shall be living at my death the said legacy to which each niece so dying would if living at my death be entitled under the trust aforesaid shall be held in trust for the child or children of such niece who shall be living at my death and if more than one in equal shares. But if any of my said nieces shall die in my lifetime without leaving any child or children who shall be living at my death then the share to which each niece so dying would if living at my death have been entitled under the trusts aforesaid shall be held in trust for and go and be paid unto my other nieces who shall be living at my death in equal shares." The testator then gave a number of other pecuniary legacies, including eleven legacies to eleven named charitable societies, and continued: "I direct that the said legacies to societies or charities shall be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes and in preference to any other payments thereout." He then bequeathed two further legacies to two other charities, and gave all other his personal estate not thereinbefore disposed of to his nephew Joseph Montague Harris absolutely.

The testator died in 1911. His estate, which was stated to be not quite sufficient for the full payment of the legacies bequeathed

by his will, comprised real and leasehold property and impure personalty.

This was an originating summons taken out by the trustees of his will raising (inter alia) the following questions :—(1.) Out of what parts of or interests in the testator's estate and in preference to what other payments thereout the charitable legacies or any or which of them ought to be paid exclusively, and (2.) whether the sums bequeathed to the testator's nephews were entitled to be paid in priority to the legacies bequeathed to the testator's nieces.

The two questions were argued and decided separately.

Warwick Draper, for the trustees.

A. Adams, for the nephews of the testator. The eleven charitable legacies to which the direction in the will applies are payable out of that part of the personal estate which prior to the passing of the Mortmain and Charitable Uses Act, 1891, would have been applicable to that purpose. This is the only way in which due effect can be given to the language which the testator has used, knowing—as he must be taken to have known —the effect and operation of the Act of 1891. *In re Bridger* (1) is distinguishable, as in that case the will was made before the passing of that Act.

Baker-Wilbraham, for another person in the same interest. The testator's language is inapplicable to leasehold land, since even under the Act of 1891 leasehold land cannot be "appropriated" for charitable purposes, but must be sold or dealt with under the provisions contained in ss. 5 and 6 of that Act. The term "appropriated" is not used in the forms to be found in the books of Precedents prior to the Act of 1891. In Wolstenholme's Forms, 5th ed. p. 122, for instance, the term used is "applicable."

Tomlin, for the charitable societies. The will must be construed according to the law as it existed at the date of the testator's death, under which the whole personal estate, including leasehold property and what used to be called impure personalty, is applicable or capable of being appropriated to charitable purposes :

(1) [1894] 1 Ch. 297.

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In re Bridger. (1) The whole of the personal estate not specifically bequeathed is, therefore, the primary fund for the payment of these legacies in priority to any other payments thereout, that is, in priority not only to other legacies but to the payments of expenses and debts, for which latter purpose the charitable legatees are entitled to have the assets marshalled so as to throw these payments on the proceeds of sale of the real estate in relief of the general personal estate.

W. W. Lucas and *J. S. Green*, for other parties.

WARRINGTON J. The questions are whether the legacies given to the various charitable societies are payable exclusively out of the entire personal estate of the testator, including a leasehold house bequeathed to the sister for her life, and, if they are so payable, then whether they are to be paid out of the personal estate in preference to any other payments. There is a subsidiary question whether these particular legacies are or are not to be paid only out of that which used to be called pure personal estate. The testator's will is very vague in many ways. He first makes certain specific devises and bequests, and he then devises and bequeaths the residue of all his real and personal estate to trustees upon trust to sell and out of the proceeds to pay the expenses incidental to the execution of the preceding trusts, his debts, funeral and testamentary expenses, and then to pay certain sums to his nephews and nieces—I am not going to say anything about the construction of that part of the will at present—and he then bequeaths certain pecuniary legacies, including legacies to eleven named charitable societies. Then follows this direction: "I direct that the said legacies to societies or charities shall be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes and in preference to all other payments thereout." He then gives two other charitable legacies without annexing to these two legacies the direction which I have read. At present I have only to deal with the eleven legacies to which that direction does apply. When the testator wrote that direction I have no doubt that he had forgotten or did not know that the Mortmain and Charitable Uses Act, 1891, had come into

(1) [1894] 1 Ch. 297.

operation, and I have no doubt that he inserted that paragraph with reference to the law familiar to him in his youth under which part, and part only, of the personal estate could, to use his own words, "lawfully be appropriated" to charitable purposes. But as a matter of fact the Act of 1891 had then been passed, and under the provisions of that Act the whole of the testator's personal estate was then capable of being appropriated to charitable purposes. It is quite true that, if a leasehold house—which for the purposes of the Act of 1891 is included in the definition of land—is so appropriated, then there is annexed to that appropriation a statutory direction that the land shall be sold, but a testator may appropriate that item of his estate to charitable purposes equally with any other item of his estate. It seems to me, therefore, that, reading this will as applicable to the relevant facts at the date of the testator's death, the personal estate, or the part of the personal estate, which may lawfully be appropriated to charitable purposes must be taken to mean the whole personal estate, and in my opinion that view is in accordance with the decision of the Court of Appeal in *In re Bridger.*(1) The facts of that case were not quite the same as the facts in the present case, because in that case the will had been prepared before the passing of the Act of 1891, and the direction given in the will was therefore in accordance with the law as it stood at the time the will was signed. The Act of 1891, however, came into operation before the date of the testator's death, and the Court of Appeal held that, notwithstanding the fact that the will had been prepared before the passing of the Act of 1891, it must be construed by reference to the state of the law as it existed at the date of the testator's death. Now the testator there had given to a charity such part of his residuary trust estate as might by law be given to charitable purposes. At the date of the will all that could by law be given for charitable purposes was his pure personal estate. At the date of his death, however, that which could by law be given for charitable purposes was the whole estate, and the Court of Appeal held that, according to the true construction of the will, there was a valid gift of the whole estate, real and personal, in favour of the charity. Applying that decision to the present case,

(1) [1894] 1 Ch. 297.

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it seems to me that when the testator directs that these legacies are to be paid "exclusively out of such part of my personal estate as may lawfully be appropriated" to such purposes, on the true construction of the will having regard to the law as it existed at his death, that direction means that these legacies are to be paid exclusively out of his entire personal estate. That being so, are those legacies to be paid out of any property other than personal estate? Plainly, no. The direction is that they are to be paid exclusively out of the personal estate. They are, therefore, not payable out of the proceeds of sale of the real estate, but they are payable out of the whole of the personal estate.

The further question then arises, if these legacies are payable exclusively out of the personal estate, are they to be paid in preference to other payments, and, if so, are they to be paid in preference to all other payments or only to other payments in the nature of legacies? The words which the testator has used are that they are to be paid exclusively out of his personal estate "in preference to any other payments thereout." Here again in construing these words I am of opinion that I cannot have regard to that which the testator obviously thought was the law, namely, that some limited part only of his personal estate could by law be applicable to the payment of charitable legacies. The fact is that the whole of his personal estate is so applicable, and the testator has distinctly said that the fund, whatever it be, which is so applicable is to be primarily devoted to the payment of these legacies—they are to be paid out of that fund "in preference to any other payments thereout." It seems to me, therefore, that the net result is that these eleven legacies must be a first charge upon the testator's personal estate not specifically bequeathed, of whatever nature it may be, in preference to all other payments, whether in the nature of expenses, debts, or other legacies, and that the assets must, if necessary, be marshalled so as to give effect to this direction.

The second question was then argued.

A. Adams, for the nephews. According to the plain language of the will the legacies to the nephews are payable in priority to

the legacies to the nieces, and there is no authority which compels the Court to arrive at a contrary construction: *Brown* v. *Allen* (1); *Blower* v. *Morret* (2); *Beeston* v. *Booth* (3); *In re Hardy* (4); *Thwaites* v. *Foreman.* (5) The words in the present case "after payment" of the legacies to the nephews are stronger than any of the expressions dealt with in the above cases and give a priority in interest to the nephews.

The question is one of construction, and the Court is not bound by decisions upon other wills so as to prevent it from giving effect to the true meaning of the testator: *In re Morgan* (6), per Lindley L.J.

R. M. Pattisson, for the nieces. The authorities clearly shew that no intention to confer priorities between pecuniary legatees is to be inferred from a mere direction to pay "in the first place," "in the next place," or "afterwards," and the language in the present case is no stronger.

[He was stopped.]

WARRINGTON J. The question is whether there is any priority as between the nephews and nieces of the testator in consequence of certain directions contained in the will. It is necessary for me to read again some part of the will. The testator devises and bequeaths to his trustees the residue of his personal estate and the residue of his real estate upon trust to sell and convert the same, and he proceeds in these terms: "I direct my trustees thereout"—that is out of the proceeds of sale and conversion—"in the first place to pay or retain all the expenses incidental to the execution of the preceding trusts and powers, and my debts and funeral and testamentary expenses, and in the next place to pay to my nephews"—whom he names—"the legacy or sum of 500*l.* each, free of duty, and after payment thereof, to pay the legacy or sum of 1000*l.* to each of my nieces"—whom he also names—and then he makes provisions for the case of any niece who may die in his lifetime, in the one case leaving issue and in the other

(1) (1681) 1 Vern. 31.
(2) (1752) 2 Ves. Sen. 420.
(3) (1819) 4 Madd. 161.
(4) (1881) 17 Ch. D. 798.
(5) 1 Coll. 409; affirmed on appeal, (1846) 10 Jur. 483.
(6) [1893] 3 Ch. 222.

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case without leaving issue. Then he proceeds to give certain other legacies.

The question with which I have now to deal is, whether by reason of the fact that the testator has directed that the legacies to his nephews are to be paid "in the next place"—that is next after the payment of debts, funeral and testamentary expenses—and that the legacies to the nieces are to paid "after payment" of the legacies to the nephews, the nephews in respect of their legacies are entitled to priority over the nieces in respect of their legacies. In my opinion the real point which has to be determined, in order to solve the question raised, is whether the testator has indicated by his will that he is doubtful whether he has left sufficient assets to pay all the legacies which he has directed to be paid, and has therefore contemplated a possible failure of some of them and for that reason directed the priorities in a legal sense which the legatees are to enjoy between themselves. If there is no such indication in the will, then the mere fact that the testator says "in the first place" pay so and so, "in the next place" pay so and so, and "afterwards," or "after payment" of the earlier legacies, pay so and so, becomes immaterial, because, if the testator leaves sufficient assets, it does not matter to anybody in what order the payments are made. The real nature of the question appears, I think, most clearly from the following passage in the judgment of Knight Bruce V.-C. in *Thwaites* v. *Foreman* (1) which I will read. The Vice-Chancellor says: "Prima facie, all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish, that it was the intention of the testator that the bequests should not stand upon an equal footing. Now, in considering whether such was the intention of this testator, we must recollect that words that are merely introductory cannot, generally, by themselves be held to direct any order of payment; we should also bear in mind an apposite observation of Sir John Leach, (I think contained in *Beeston* v. *Booth* (2)), that, unless the testator tells you himself, that he believes his assets to be insufficient, you must attribute to him

(1) 1 Coll. 414. (2) 4 Madd. 168.

the notion that he has assets sufficient to satisfy all the bequests that he makes; and, if you attribute that notion to him, you cannot well infer, that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient." In my opinion those remarks of Knight Bruce V.-C. are not merely observations directed to the construction of the particular will before him, but they are observations which guide the Court in the construction of all wills upon which this particular question arises, and they are surely common sense. A man does not, as a general rule,—and certainly no such assumption can be made without evidence to support it—contemplate that his estate will be insufficient to fulfil the several dispositions which he has made, and, if he does not contemplate any insufficiency, then, as Knight Bruce V.-C. points out, the mere direction as to the order in which payments are to be made becomes wholly immaterial. In the present case is there anything in this will to indicate that the testator was intending to provide for an insufficiency and for that purpose to give certain legatees priority in interest—not merely in date or time of payment or anything of that kind—but a priority of interest over other legatees? I can find absolutely nothing. The testator gives directions for payment of these sums; he gives a number of other legacies; he gives some for charitable purposes, and he gives the ultimate residue of the personal estate to a particular person. There is not a word in this will—excepting the expressions which I have to construe—to indicate that the testator had the least doubt that all the legacies which he was giving would be satisfied. Bearing that in mind, do the words in question indicate any such intention? In my opinion they indicate nothing of the kind; they must be taken as directions having reference to the legacies by themselves. At the outset the testator has directed the trustees "in the first place to pay and retain the expenses incidental to the execution of the preceding trusts and powers and my debts and funeral and testamentary expenses." That direction cannot be intended to give any priority to the payments which he is referring to; they have priority—if priority becomes important —without those words. In my opinion, by using the words "in the first place" and "in the next place" the testator is merely

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giving a list or catalogue of the payments which the trustees are to make out of the proceeds of the sale and conversion of his estate; and, if that is so, the words "after payment" of the sums to the nephews, by which the direction to pay the nieces is introduced, really amount to no more than as if he had said "and in the third place to pay" the legacies to the nieces. In other words they are merely a direction as to the order in time in which these various payments are to be made—the way in which the testator thinks that the executors will make the several payments. In my opinion, therefore, the words which the testator has used do not indicate that the nephews are to have any priority of interest over the nieces, and the legacies given to the nephews and the legacies given to the nieces must accordingly rank pari passu.

Solicitors: *William Sturges & Co.; W. Cecil Harris; Coward, Hawksley & Co.; J. A. Collins, for J. & S. Harris, Leicester; Engall & Crane; W. J. Fraser & Son.*

A. C.

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May 14, 16, 23.

In re HAWKES.

REEVE *v.* HAWKES.

[1912 H. 1016.]

Mortgage — Banking Account guaranteed by Testator — Mortgaged Property specifically devised—Real Estate Charges Act, 1854 (*Locke King's Act*, 17 & 18 *Vict. c.* 113), *s.* 1.

A testator by his will made in 1900 specifically devised to his son A. certain freehold property, and died in 1912. In 1899 he had given to his bankers a memorandum charging this property with all moneys for the time being due and owing from him on any account whatever, having then an account at the bank (used for the purposes of his business), which he was afterwards allowed to overdraw. The testator being incapacitated by illness, A. early in 1902 took over the management of the business on the testator's behalf, and the account, then in credit, was transferred into the names of A. and a daughter of the testator. In September, 1902, the bank allowed A. to overdraw the account on the testator giving a guarantee for the overdraft. In 1907 the account, then in debit, was, at the testator's request, transferred into the names of A. and another daughter of the testator, the testator giving the bank a document whereby he requested the bank to permit A. and the daughter to overdraw and guaranteed payment of all moneys then or thereafter due on the general balance of their account or for advances or otherwise. At the testator's death the guaranteed account was in debit, but the debit balance was afterwards paid out of his personal estate:—

Held, that the charge of 1899 included all money due or capable of becoming due by the testator to the bank under the guarantee of 1907; that the testator was in substance and in fact the principal debtor for the amount overdrawn at his death; and, therefore, that Locke King's Act applied, and the freehold property specifically devised to A. must bear the charge for that amount to the exoneration of the personal estate.

If in substance as well as form the testator had been merely a surety for the payment of the debit balance, and the principal debtor had paid it off after the testator's death, Locke King's Act would not have applied.

Elijah Hawkes, a horsedealer, of Cathall Road, Leytonstone, by his will, dated November 1, 1900, gave the furniture and effects there to his son Albert and his daughters Lavinia Daley and Edith equally, and directed his horses and stock in trade to be sold; and gave to his son Albert 2000*l.* and his freehold premises at Cathall Road aforesaid and certain vehicles there,

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and bequeathed to his daughters Betsy Watson, Lily Palmer, Ada Saltrick, and Kate Payne 500*l.* each, and gave to his son George and his brother Joseph 100*l.* each, and gave the residue of his estate to his son Albert and his daughters Lavinia and Edith equally. His son Albert and Arthur Reeve were appointed trustees and executors of the will.

The testator died on January 29, 1912, and his will was proved by Albert Hawkes and Arthur Reeve.

Arthur Reeve took out an originating summons for the determination of the following question: Whether by virtue of (*a*) a charge dated November 20, 1899, given by the testator in favour of his bankers as a security for all moneys due from him to the bankers, and (*b*) a guarantee dated December 6, 1907, and hereinafter referred to, or otherwise howsoever, the testator's freehold premises at Cathall Road specifically devised to Albert Hawkes passed to him subject to and charged with a sum of about 2000*l.* due to the bankers in respect of an overdraft on an account in the names of Albert and Edith Hawkes, or whether such sum was to be borne by and out of the testator's residuary estate.

The question thus raised arose under the following circumstances. On November 20, 1899, the testator executed a memorandum charging the property by his will specifically devised to Albert Hawkes with the payment to the testator's bankers of all moneys for the time being due and owing from him to them on any account whatever. He had at this time an account at the bank which he used for the purpose of his business as a horsedealer, and which he was subsequently allowed to overdraw. Early in 1902 the testator had a paralytic stroke, and his son Albert Hawkes took over the management of the business on his father's behalf. It was thought convenient for this purpose that his account at the bank, which was then in credit, should be transferred into the names of Albert Hawkes and the testator's daughter Lavinia, and this was done in February, 1902. In September, 1902, Albert Hawkes desired to overdraw the account, and the bank allowed him to do so on the testator giving the bank a guarantee for the overdraft. In December, 1907, Lavinia Hawkes being about to marry, the

account, which was then in debit, was at the testator's request transferred into the names of Albert Hawkes and the testator's daughter Edith, and the testator at the same time gave to the bank a guarantee dated December 6, 1907, by which he requested the bank to permit Albert Hawkes and his daughter Edith to keep their account with the bank and to give them such credit and make them such advances as they might require, and guaranteed to the bank the payment of all moneys then and thereafter due to the bank on the general balance of their account or for advances or otherwise. When the testator died the guaranteed account was in debit to the amount of over 2000*l.*, but the debit balance was after his death satisfied out of the testator's personal estate.

The summons was adjourned into Court and was heard on May 14 and 16, 1912.

R. Roope Reeve, for the plaintiff, stated the facts and the question involved.

A. Grant, K.C., and *Heber Hart*, for Albert Hawkes. The property specifically devised to Albert Hawkes was not at the time of the testator's death "charged," within the meaning of s. 1 of Locke King's Act (17 & 18 Vict. c. 113), with the debit balance on the guaranteed account, and he took the property free from the amount. The charge of 1899 was only in force while the relation of banker and customer existed between the bank and the testator, and came to an end when the testator closed his account in 1902. Merely allowing the title deeds to remain in the bank's custody is not evidence of the continuation or creation of an equitable mortgage by deposit. The money owing at the testator's death had been advanced on the security of the guarantee given in December, 1907. The mere giving of a guarantee does not create a debt, although a debt may afterwards arise out of it. Albert Hawkes and Edith Hawkes were primarily liable, and as between themselves and the bank and the testator were the principal debtors, whereas the testator was only a surety; although, as between themselves and the testator, he was primarily liable, and they could call on his executors to pay to them the money required to satisfy any debt which they

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had incurred with the bank on the testator's behalf, and could apply the moneys received in discharge of the debt to the bank. But Locke King's Act does not apply to a case like this. [They referred to *In re Ritson.* (1)]

Ranald G. McDonald, for the residuary and pecuniary legatees. The liability under the guarantee of 1907 is covered by the charge of 1899, which continued in force until the testator's death. The freehold property was, therefore, "charged" with the amount within the meaning of the Act, and Albert Hawkes, the devisee of it, is not entitled to have the amount discharged out of the testator's personal estate.

Cur. adv. vult.

May 23. PARKER J. On November 20, 1899, the testator executed a memorandum charging the property by his will specifically devised to Albert Hawkes with the payment to his bankers of all moneys for the time being due and owing from him to them on any account whatever. He had at the time an account at the bank which he used for the purposes of his business as a horsedealer and which he was subsequently allowed to overdraw. Early in 1902 the testator had a paralytic stroke, and his son, Albert Hawkes, took over the management of the business on his father's behalf. It was thought convenient for this purpose that his account at the bank, which was then in credit, should be transferred into the names of Albert Hawkes and the testator's daughter Lavinia, and this was done in February, 1902. In September, 1902, Albert Hawkes desired to overdraw the account, and the bank allowed him to do so on the testator giving the bank a guarantee for the overdraft. In December, 1907, Lavinia Hawkes being about to marry, the account, which was then in debit, was at the testator's request transferred into the names of Albert Hawkes and the testator's daughter Edith, and the testator at the same time gave to the bank a guarantee dated December 6, 1907, by which he requested the bank to permit Albert Hawkes and his daughter Edith to keep their account with the bank and to give them such credit and make them such advances as they might require and

(1) [1899] 1 Ch. 128.

guaranteed to the bank the payment of all moneys then and thereafter due to the bank on the general balance of their account or for advances or otherwise.

When the testator died the guaranteed account was in debit to the amount of over 2000*l.*, but the debit balance has since his death been satisfied out of the testator's personal estate.

Under these circumstances the question arises whether the property specifically devised to Albert Hawkes was at the testator's death charged within the meaning and for the purposes of Locke King's Act with the debit balance on the guaranteed account. In my opinion the charge of November 20, 1899, included according to its true construction, in the events which have happened, all money due or capable of becoming due from the testator to the bank under the guarantee of December 6, 1907. No doubt, if in substance as well as in form the testator had been merely a surety for the payment of the debit balance, and the principal debtor had actually paid it off after the testator's death, Locke King's Act would have had no application. But here in substance and in fact the testator was not a surety, but the principal debtor for this balance, and Albert Hawkes and his sister Edith were in the position of sureties only. The guarantee was for moneys for which, as between these persons and himself, the testator was in equity at any rate primarily liable, and the specifically devised property was charged with these moneys. Even as between the testator and the bank I am not sure that the testator was not in the position of a principal debtor, for the account was opened and allowed to be overdrawn at his request. At any rate, if Albert Hawkes and his sister had been forced to pay the debit balance out of their own moneys, they would in equity have been entitled to all securities given by the testator to the bank. It may be said that in that event the charge would have been ineffective, because it could not be shewn that any payment had been made under the guarantee. I doubt whether this argument would have prevailed. But the fact is that the testator's estate has paid off an overdraft for which he was in equity if not at law primarily liable, and for the payment of which he had mortgaged the specifically devised property, and

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I do not see why I should hold that these moneys were not paid under the guarantee. In my opinion, therefore, Locke King's Act applies, and the property is subject to a charge in favour of the testator's personalty for the amount of the debit balance in question.

Solicitor for all parties: *Lewis Walter Taylor.*

F. E.

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[1912 M. 245.]

Education—Non-provided School—Headmaster—Dismissal—Managing Body—Foundation Managers—Declaration as to Membership of Church of England—Churchwardens—Qualification—Residence—Validity of Appointment—Defect in Appointment or Qualification of any Manager—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 6, 7, 11; *Sched. I., B* (3.).

The Final Order made by the Board of Education under the Education Act, 1902, in respect of a non-provided elementary Church of England school provided that the foundation managers should be members of the Church of England, and that no person should "be entitled to act as a foundation manager" until he had signed a declaration that he was a member of the Church of England.

At the date when the body of managers of the school in question purported to dismiss the headmaster, three of the foundation managers had not signed the required declaration.

Sched. I., B (3.), of the Education Act, 1902, provides that the proceedings of a body of managers "shall not be invalidated by any defect in the election, appointment, or qualification of any manager":—

Held, that the words of the Final Order did not amount to an absolute prohibition against any foundation manager acting until he had signed the declaration in question, and that the provision in Sched. I., B (3.), applied to validate the acts of the body of managers.

Objections were also taken to the validity of the appointment of the two nominated managers and of the co-optative manager:—

Held, that, having regard to the same provision in Sched. I., B (3.), any objections to the appointment of the three managers in question, founded upon any invalidity in the appointment of any of them, or the alleged want of authority in those who appointed them, did not invalidate the proceedings of the body of managers.

Held, therefore, that the notice dismissing the headmaster could not be impeached, and his action claiming a declaration that it was inoperative must be dismissed.

Quære, whether a non-resident parishioner elected to the office of churchwarden can be compelled to serve.

THE plaintiff, Frederick George Meyers, was a certificated teacher, and in 1881 was appointed by the managers of the Ash Church of England School, near Wrotham, in the county of Kent, to be headmaster of the school, which post he had held ever since. The school was a public elementary school not provided by the local education authority, and the schoolhouse was held on the terms of two trust deeds of 1867 and 1873. On the Education Act, 1902, coming into operation the Kent County Council became the local education authority for the purposes of that Act in the area in which the school was situated.

The defendant, the Rev. Harold Barclay Hennell, was the rector of Ash, and ex officio manager of the school. The defendant George Day was the manager appointed by the Kent County Council, and the defendant John Hollands was the manager appointed by the Ash Parish Council. The other three defendants, Sydney Charles Green, Gilbert Edgar Holmes, and Henry Roffey Meadway, claimed to be three other foundation managers of the school. By the terms of the Final Order made by the Board of Education under s. 11 of the Education Act, 1902, and dated January 18, 1904, the foundation managers of the school were to consist of one ex officio manager, two nominated managers, and one co-optative manager. The nominated managers were to be persons appointed by the principal officiating minister, the churchwardens, and overseers of the ecclesiastical parish of Ash. The co-optative manager was to be appointed from time to time by the foundation managers. It was further provided by the Order (paragraph 6) that the nominated managers and the co-optative manager should be persons possessing certain qualifications, and that such qualified persons should in each case be and continue to be bona fide members of the Church of England, and that no person who was required to possess these qualifications should "be entitled to act as a foundation manager" until he had signed a declaration that he was a member of the Church of England. In 1910 the nominated managers were Francis Lambarde and Charles Hillary Wild, and the co-optative manager was Richard Antrum.

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At the Easter vestry of 1911 for the parish of Ash the rector purported to appoint S. C. Green as rector's warden. The plaintiff alleged that Green was not a resident householder in the parish and that his appointment was invalid. At the same vestry the defendant G. E. Holmes and Charles Hillary Wild were proposed for the office of people's warden. Among those present and voting was the defendant Meadway, who was not a ratepayer or resident householder in the parish. The rector presided and notwithstanding objection allowed the vote of Meadway, which made three votes for each candidate, whereupon the rector gave a casting vote for Holmes. On May 17, 1911, both Green and Holmes were duly admitted churchwardens by the Ordinary, and had since acted as such without any objection being taken.

On May 22, 1911, Green and Holmes were appointed members of the body of managers of the school, and neither of the three former managers was summoned to attend at this meeting.

On October 9, 1911, the defendants wrote to the Kent Education Committee with respect to a complaint against the plaintiff. A meeting of five of the defendants was held on December 6, 1911 (Green not being present), and it was resolved that the plaintiff should be dismissed.

On December 11, 1911, the plaintiff received a three months' notice signed by the rector dismissing him from his office of headmaster of the school.

The plaintiff alleged that the appointments of Messrs. Green, Holmes, and Meadway were wholly void, and further that these three defendants had not signed the declaration required by the Final Order, and could not act as foundation managers until they had done so. The plaintiff, therefore, said that the defendants were not qualified to dismiss him, and claimed a declaration that his engagement as headmaster had not been duly and lawfully determined, and an injunction to restrain the defendants from dismissing him until his engagement had been lawfully determined; in the alternative, 500*l.* damages for wrongful dismissal.

The main defences were that the churchwardens had been duly appointed; that the acts done had been done by the body of

managers, and if there was any defect in the election, appointment, or qualification of any manager, which was denied, such acts were valid by virtue of the Education Act, 1902, Sched. I., B (3.); and further that the defendants Green, Holmes, and Meadway were in fact bona fide members of the Church of England and had now signed a declaration to that effect, and that if they had not signed at the time of the acts set out in the statement of claim the failure to sign was a defect in the appointment or qualification of the individual manager only and did not invalidate the proceedings of the body of managers. The merits of the ground for dismissal were not gone into, it being admitted that the defendants were entitled under the Act to dismiss any teacher, so long as they were properly qualified managers.

P. O. Lawrence, K.C., and *A. A. Thomas*, for the plaintiff. The signing of the declaration required by the Final Order of January 18, 1904, is a condition precedent to any valid acts of the managers. That is established by cases in which analogous provisions were required to be observed: *Ludlow Corporation* v. *Prosser* (1); *Prowse* v. *Foot* (2); *Rex* v. *Roberts* (3); *Rex* v. *Swyer* (4); *Hounsell* v. *Suttill.* (5)

Secondly, the persons who purported to act as a nominating body were not properly qualified to act. Messrs. Green and Holmes were not duly elected churchwardens; a churchwarden must be a resident parishioner: *Rex* v. *Poynder* (6); *Rex* v. *Townson.* (7) The parson cannot vote at the election of the people's churchwarden: *Rex* v. *Bishop of Salisbury.* (8) The former churchwarden continues in office: *Bray* v. *Somer.* (9) The case of *Rex* v. *Rice* (10) shews that the admission of the churchwardens by the archdeacon does not cure the defect in their election. It is a mere ministerial act.

Thirdly, the co-optative manager was improperly appointed: *Fisher* v. *Jackson.* (11)

(1) (1906) 22 Times L. R. 597.
(2) (1725) 2 Bro. P. C. 289.
(3) (1835) 3 Ad. & E. 771.
(4) (1830) 10 B. & C. 486.
(5) (1887) 19 Q. B. D. 498.
(6) (1823) 1 B. & C. 178.
(7) (1908) 24 Times L. R. 690.
(8) [1901] 1 K. B. 573; [1901] 2 K. B. 225.
(9) (1862) 2 B. & S. 374.
(10) (1696) 1 Ld. Raym. 138.
(11) [1891] 2 Ch. 84.

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Fourthly, the presence of an unqualified person renders void all the actions of the managers: *Lane* v. *Norman*. (1)

Lastly, with regard to the wording of the declaration, our contention is that "no person shall be entitled to act" is equivalent to "no person shall act." It must mean that a foundation manager shall not act, or be capable of acting, till he has signed the necessary document. That is consistent with the meaning attributed to the word "entitled" in the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 11: *In re Sutton Coldfield Grammar School* (2); *In re the Free Grammar School and Hospital of Archbishop Holgate at Hemsworth and the Grammar School at Barnsley*. (3) So also in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 157, the expression "capable of acting" is analogous to "entitled to act." The Franchise Acts do not assist the case.

[EVE J. referred to *In re "Otto" Electrical Manufacturing Co.* (1905), *Ld.* (4)]

Clayton, K.C., and *Edwardes Jones*, for the defendants. The consequences of the decision, if against the defendants, will be startling to those administering the Education Acts, and even to all corporate bodies. The argument of the plaintiff amounts to this, that you may go back into an investigation of the churchwardens' title. If so the title of the nominated managers might also have to be investigated, and whether the Ash Council and the Kent County Council, who appointed managers, had been properly constituted. The utmost which the Court can do is to make a declaratory order in the present case. The defences to the action are numerous.

First, the body of managers, in their quasi-corporate capacity, have the exclusive power of dismissal with the consent of the local education authority, and the dismissal cannot be questioned: Education Act, 1902 (2 Edw. 7, c. 42), s. 7, sub-s. 7; *Reg.* v. *Darlington Free Grammar School*. (5)

Secondly, if there were no such provision, the Act clearly provides for any irregularity by Sched. I., B (3.). (6) That provision

(1) (1891) 66 L. T. 83.
(2) (1881) 7 App. Cas. 91.
(3) (1887) 12 App. Cas. 444.
(4) [1906] 2 Ch. 390.
(5) (1844) 6 Q. B. 682.
(6) By Sched. I., B (3.), of the

covers any irregularity, if it exists: *Newhaven Local Board* v. *Newhaven School Board.* (1)

Thirdly, under clause (11.) of the same Sched. I., B, until the contrary is proved, a body of managers shall be deemed to be duly constituted. In the present case "the contrary" has not been proved. The meaning in the declaration of the word "entitled" is "entitled as of right." The manager has to be a bona fide member of the Church of England. That is his qualification. If he has made the required declaration no one can go behind it.

Fourthly, the appointment and qualification of the managers cannot be questioned in this way. It can only be by quo warranto or by mandamus. The title of corporators cannot be questioned whenever the corporation enters into a contract. Equity never had jurisdiction to deal with the question: Grant on Corporations, p. 244. Moreover, the Final Order of January 18, 1904, has provided a particular mode of dealing with the matter by constituting the Board of Education the final tribunal.

Fifthly, the body of managers are in fact and in law duly constituted. There is no question arising as to any persons except the foundation managers. As to Green and Holmes, they were appointed by the principal officiating minister and churchwardens, acting as such, that is, the churchwardens de facto, as they clearly were. They were sworn in by the archdeacon, who constitutes an ecclesiastical court; Prideaux's Churchwardens' Guide, 16th ed. pp. 47—49; *Doe* v. *Barnes.* (2) The churchwardens were rightfully appointed, and it was sufficient that they were churchwardens de facto. It was for the rector to say on whom the nomination fell. If objected to, a poll should have been demanded or proceedings taken to question the election. The rector had a right to preside at the meeting and to intervene to the extent of giving a casting vote in the appointment of the people's warden: *Reg.* v. *D'Oyly* (3); *Rex* v. *Bishop*

Education Act, 1902 (2 Edw. 7, c. 42), it is provided that "The proceedings of a body of managers shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment or qualification of any manager."

(1) (1885) 30 Ch. D. 350.

(2) (1846) 8 Q. B. 1037.

(3) (1840) 12 Ad. & E. 139, 158.

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of Salisbury. (1) The decision of the chairman is conclusive if no poll is demanded, and none was demanded here. If the election was to be questioned it must be done promptly: *Reg.* v. *Thomas* (2); *Reg.* v. *Handborough Churchwardens.* (3) With regard to the qualification of a person to be elected it is not necessary that he should actually reside in the parish: Cripps' Clergy Law, 6th ed. pp. 173, 174; *Rex* v. *Poynder* (4); *Etherington* v. *Wilson.* (5) If the contention of the plaintiff is right, questions can be raised years after. It is further said that the co-optative manager, Meadway, was not properly elected because the outgoing co-optative manager was not summoned to the meeting, but all the members need not vote, and the fact of one being absent, even if he was entitled to appear, does not matter.

Sixthly, the liability (if any) is qua managers and not personally.

Seventhly, the conduct of the plaintiff shews acquiescence and waiver of objection.

Eighthly, this is really an action to specifically enforce a contract for service. The Court cannot do that and say a master shall employ a particular servant. If the servant is wrongly dismissed, there may be a claim for damages, but if dismissed in accordance with contract, none. There can be no specific performance here.

Ninthly, this case comes under the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 16, 17, as a charitable trust. This action calls in question the title of the trustees to administer the trust; and before a suit can be entertained notice to the Board is required: *Rooke* v. *Dawson.* (6) The Education Act, 1902, s. 11, sub-s. 6, constitutes the managers trustees.

Tenthly, this case is contrary to principle. A person cannot challenge the acts of a board of directors because one director may not have been properly appointed: *Browne* v. *La Trinidad* (7); *Boschoek Proprietary Co.* v. *Fuke.* (8)

(1) [1901] 1 K. B. 573; [1901] 2 K. B. 225.
(2) (1883) 11 Q. B. D. 282.
(3) (1877) 37 L. T. 400.
(4) 1 B. & C. 178.
(5) (1875) 1 Ch. D. 160.
(6) [1895] 1 Ch. 480.
(7) (1887) 37 Ch. D. 1.
(8) [1906] 1 Ch. 148.

On all these grounds we say that the action is unfounded and should be dismissed. The cases cited by the plaintiff are not really applicable to the present.

P. O. Lawrence, K.C., in reply. With regard to the declaration required by the Final Order, there is an express prohibition against the managers acting until they have signed the declaration. The case of *Lane* v. *Norman* (1) is on all fours with the present. This case is not covered by Sched. I., B (3.).

EVE J. The arguments in this case have ranged over a wide area, and many interesting topics have been discussed. If I felt it incumbent upon me, in order to determine the rights of the parties, to pronounce a decision on all the questions which have been so elaborately argued, I should certainly take time to consider my judgment, but, in the view which I take of the facts and the law applicable thereto, I do not think any good purpose will be served if I postpone stating the conclusion at which I have arrived.

The plaintiff was, until the date hereinafter mentioned, and he still claims to be headmaster of the Church of England School at Ash near Wrotham, in the county of Kent. The six defendants claiming to act as managers, and as they assert acting de facto and de jure as managers of the school, purported to terminate the plaintiff's employment as headmaster by a three months' notice expiring on March 11 last. The plaintiff admits, for the purposes of this hearing only, that the notice given to him was in accordance with the terms of his contract of employment, but he contends that the notice was inoperative because the defendants did not at the material date, which would be December 11, constitute the managing body of the school and were for various reasons incompetent to dismiss him from his office. He therefore claims a declaration that the notice was inoperative and ineffectual, and by way of ancillary relief an injunction restraining the defendants from acting on the notice.

The three grounds upon which this contention is based are as follows: First, the defendants Green and Holmes, the nominated managers, and the defendant Meadway, the co-optative manager,

(1) 66 L. T. 83.

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had none of them signed the declaration of membership of the Church of England required by clause 6 of the Final Order of the Board of Education, dated January 18, 1904, and numbered 197; secondly, the appointments on May 22, 1911, of the defendants Green and Holmes as nominated managers were invalid and void because the persons who purported as churchwardens of the parish of Ash to concur with the overseers in the appointments were not duly elected as churchwardens of the parish; and, thirdly, the appointment on the same day of the defendant Meadway as co-optative manager was invalid and void, first because, the appointments of Green and Holmes being void, there was no body of persons qualified to appoint the co-optative manager, and secondly, even if the appointments of Green and Holmes were not invalid and void, the proper body to appoint the co-optative manager was made up of the ex officio manager, the two nominated managers, and the retiring co-optative manager, and on the occasion of the appointment of Meadway the retiring co-optative manager was not summoned to the meeting convened for the appointment of his successor. Under No. 2 of these grounds several subsidiary questions have been raised. At the adjourned Easter vestry on May 1, 1911, Green and Holmes claim to have been appointed rector's and parishioners' warden respectively, and on May 17 they were both duly admitted to the office by the Ordinary, but the plaintiff asserts that Green, although a parishioner and the occupier of land (some six acres or more) in the parish, was not qualified for the office, because he had no residence within the parish, and that Holmes was never in fact elected, the majority of the votes of qualified electors being recorded for another candidate, Mr. Wild. In this state of affairs he argues that the ministerial act of admission by the Ordinary could not avail to cure the original defects in the appointments, and on the authority of *Bray* v. *Somer* (1) and *Lane* v. *Norman* (2) he submits that the outgoing churchwardens, Mr. Lambarde and Mr. Wild, continued in office. I ought, perhaps, to note in passing that the plaintiff makes no point of the fact that Green and Holmes, assuming them to be the churchwardens, joined in the

(1) 2 B. & S. 374. (2) 66 L. T. 83.

appointment of themselves as nominated managers. The power of appointing the nominated managers is vested in the churchwardens and overseers, and in this case, assuming that Green and Holmes were churchwardens, they as two of the four appointors were parties to the appointment of themselves as nominated managers, but the plaintiff makes no point of this, and I only mention it to shew that it has not been overlooked.

I do not think it is necessary for me to adjudicate upon the subsidiary questions to which I have alluded, or to deal in detail with the arguments relating to them. As to the question of Green's qualification I have looked at various authorities, which at first sight appear to be somewhat conflicting, and I think it may be that the true explanation of the apparent conflict on the point whether residence within the parish is or is not necessary to qualify for the office is this, that although non-residence does not disqualify for the office, a non-resident parishioner cannot be compelled to serve in the office. It may be that this is the true way in which the somewhat conflicting authorities are to be reconciled. As regards Holmes, there was undoubtedly some confusion and possibly some irregularity at the adjourned vestry meeting, and on the evidence I doubt whether Holmes really was elected, but, as has been pointed out, no poll was demanded, nor was any application made to the Court to enforce a proper election, and, as at present advised, I do not think the validity of Holmes' election can be impeached in an action or proceedings of this nature. But, as I have already said, I do not pause to deal with these various matters and the recondite questions they give rise to, because, in my opinion, all those subsidiary questions together with the larger questions to which they are subsidiary, and which involve the points as to the validity of the appointments as managers of the defendants Green, Holmes, and Meadway, are for the purposes of to-day effectually dealt with and disposed of by clause 3 of Part B of the First Schedule to the Education Act of 1902.

That clause reads thus: "The proceedings of a body of managers shall not be invalidated by any vacancy in their number, or by any defect in the election, appointment or qualification of any manager"; and I think it is expressly directed

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to preclude the raising of such questions as are involved in the plaintiff's allegations in this case, that the nominated and co-optative managers were not legally appointed because of some defect or irregularity in their appointment, or some defect in the title, or irregularity in the election of those who purported to confer upon them their offices. Any other view of the position would lead to most disastrous and lamentable results. In this case the bulk of the evidence has been directed to, and the conflict has been waged round, the status of the de facto churchwardens, but if it is open to the plaintiff in this case to impeach the authority of the managers on the ground of any want of title in those who immediately appointed them, it would obviously be open to every person suing, or sued by, the managers to lead a similar attack or raise a similar defence, and, instead of limiting it to those from whom the managers derive immediate authority, to carry it back to the first person from whom the title of the last appointee could be said to have originated. I think, therefore, so far as the objections are founded upon any invalidity in the actual appointments of these three gentlemen, or on the alleged want of authority in those who appointed them, they are met entirely by the clause in Part B of the schedule to which I have referred.

That leaves for decision the important question whether the defendants Green, Holmes, and Meadway, no one of whom had signed the declaration required by clause 6 of the Final Order, could act as a manager without having signed such declaration. The Order provides that there shall be foundation managers to the number of four; of these one is the ex officio manager, the rector, two more are called nominated managers, and the fourth is the co-optative manager. The ex officio manager is qualified by the office he holds as officiating minister of the parish. The nominated managers and the co-optative manager must be persons possessing certain qualifications enumerated in the Order, that is to say, each must be a person residing in or near the ecclesiastical parish or district, or having a beneficial interest to the extent of a life estate, at the least, in real property situated in the parish, and each must be a bona fide member of the Church of England. In these respects each of the three defendants,

Green, Holmes, and Meadway, is fully qualified, but clause 6 (the clause of the Order dealing with qualification) goes on to provide that no person who is required to possess the qualifications I have enumerated, which is in effect the same thing as saying "no nominated or co-optative manager," shall be entitled to act as a foundation manager until he has signed a declaration that he is a member of the Church of England. Does this absolutely prohibit a qualified person who has omitted to sign such a declaration from doing any act as a manager, or is it a qualified prohibition equivalent to "shall not have the legal right to" act as a manager, in which case it would be a matter of qualification, or does the whole sentence relate to the discharge of duties incident to the office of foundation manager as distinct from that of manager? The plaintiff argues that it is an absolute prohibition against any nominated or co-optative manager acting as a manager until he has signed the declaration. On behalf of the defendants it is said that so to construe it is to disregard the three words introduced between the words "shall" and "act," namely, the words "be entitled to," and Mr. Edwardes Jones, to whose assistance in this case I am much indebted, insists also that the introduction of the word "foundation" before the word "manager" is deliberate and cannot be disregarded, and that the prohibition, whether absolute or qualified, relates to acts done as a foundation manager, and not as a manager. I think on the question of construction the Court cannot disregard any of the words used, and that some effect must be given to the words "be entitled to," and to the word "foundation," but the difficulty is to say what effect ought to be given to them. I think the words "be entitled to" do qualify the nature of the prohibition—that is to say that their use shews that the prohibition is not an absolute prohibition, and that they are used as equivalent to the words "be qualified to," and on this construction clause 3 in Part B of the First Schedule is an answer to this contention of the plaintiff also.

I leave open the question what meaning is to be attached to the word "foundation" in this clause. It may be, as Mr. Edwardes Jones has argued, that a distinction is intended to be drawn between acts done as a manager and acts done as a foundation

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manager, or it may be, as contended for by the plaintiff, that all acts done by a manager are acts done by him as a foundation manager, but it is not necessary for me to decide that point, which is obviously one upon which a great deal can be said from both points of view.

The result is that in my opinion the plaintiff has failed to establish any ground upon which he can successfully impeach the notice of December 11; his action fails, and if the managers ask for costs, I must dismiss it with costs.

Solicitors: *Baker & Nairne; G. Thatcher.*

G. M.

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[1883 H. 5008.]

Partition Action—Order for Sale—Conversion—Person sui juris at Date of Order—Person subsequently becoming sui juris—Married Woman—No Request for Sale—Death of Husband—Partition Act, 1868 (31 & 32 *Vict.* c. 40), *s.* 8—*Partition Act*, 1876 (39 & 40 *Vict.* c. 17), *s.* 6—*Leases and Sales of Settled Estates Act*, 1856 (19 & 20 *Vict.* c. 120), *ss.* 23, 24, 25.

Notwithstanding the incorporation of ss. 23 to 25 of the Settled Estates Act, 1856, in s. 8 of the Partition Act, 1868, an order for sale under the Partition Acts converts the share of a person absolutely entitled and sui juris at the date of the order into personalty.

In re Barker (1881) 17 Ch. D. 241; *In re Pickard* [1885] W. N. 137; 53 L. T. 293; *Arnold* v. *Dixon* (1874) L. R. 19 Eq. 113; 23 W. R. 314; *Mordaunt* v. *Benwell* (1881) 19 Ch. D. 302; *In re Dodson* [1908] 2 Ch. 638; and *Fauntleroy* v. *Beebe* [1911] 2 Ch. 257, discussed and applied.

The share of a married woman originally unconverted for want of a formal request for sale under s. 6 of the Partition Act, 1876, is not subsequently converted by the mere fact of her becoming discovert.

SUMMONS.

In the above partition action, commenced November 12, 1883, the plaintiffs John Herbert, James Herbert, and others claimed a sale of certain copyhold hereditaments in which they and the defendants held undivided shares.

By an order dated January 12, 1884, made upon motion for judgment, the plaintiffs and defendants who claimed to be interested in a moiety of the hereditaments in the pleadings

mentioned (the plaintiff Mary Edwards, married woman, by her counsel authorized to act on her behalf, and the infant defendants by their guardian by their counsel) requesting a sale thereof and a distribution of the proceeds instead of a division of the said hereditaments between or among the persons interested, the usual inquiries and accounts were directed, and it was ordered that if it should be certified that all the parties interested were parties to the action or had been served with notice of the judgment, or that service of notice had been dispensed with, any persons interested were to be at liberty to apply at chambers for a sale.

By his certificate dated June 23, 1887, and filed July 4, 1887, the chief clerk certified the parties interested and their shares and that they were all parties to the action or bound by the proceedings.

By an order for sale made July 9, 1887, upon the application of the plaintiffs, and upon hearing the solicitors for the applicants and for the defendants and for Gwilym Cristor James, Margaret Thomas, widow, and Jemima Isaac, wife of Jonathan Isaac, parties served with notice of judgment and who had entered appearances, and for Horatio Rowlands and Elizabeth his wife, Thomas Harrison and Mary his wife, Edward Powell and Margaret his wife, Gwenllian Williams, spinster, Daniel Herbert Daniel and Ann his wife, parties having liberty to attend by order dated February 16, 1887, and upon reading the judgment, an order dispensing with service of notice on Jacob Herbert, son of Job Herbert, and the certificate whereby it appeared that all persons interested in the property to which the action related were parties to the action or bound by the proceedings, it was ordered that the hereditaments be sold with the approbation of the judge subject to the provisions of s. 4 of the Partition Act, 1876, and that the money to arise by the sale be paid into Court to the credit of the action subject to further order.

This sale was never proceeded with, as it was doubtful whether the copyholders were entitled to the minerals, and it was not till October 6, 1904, that an enfranchisement including the mines and minerals was obtained.

Many of the persons originally interested were dead and it was

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necessary to determine whether their shares had devolved as real or personal estate.

The plaintiff John Herbert died on March 20, 1893, having by his will dated March 10, 1890, devised his real estate and leaseholds to his executors and trustees in trust for his wife, Jane Herbert, for life, with remainder to certain devisees, and having bequeathed his personal estate in trust for his wife absolutely.

Jane Herbert died on August 19, 1897, having by her will and codicil dated July 30, 1896, and February 22, 1897, devised and bequeathed her real and personal estate to her executors and trustees in trust for sale and conversion, the proceeds to be held in trust for certain beneficiaries.

The plaintiff James Herbert died on January 6, 1903, intestate.

This summons was issued to determine (inter alia) how the shares of John Herbert and James Herbert had devolved.

Micklem, K.C., G. E. Cruickshank, and *Horace Freeman,* for the devisees of John Herbert. The order for sale did not effect a conversion. Sect. 8 of the Partition Act, 1868, provides that ss. 23 to 25 of the Settled Estates Act, 1856, "shall extend and apply to money to be received on any sale effected under the authority of this Act." These incorporated sections clearly prevent the order for sale operating as a conversion.

Sect. 23 provides that all money to be received on any sale effected under the Act may, if the Court think fit, be paid to trustees, or otherwise shall be paid into the Bank of England or Ireland, as the case may be, to the account of the Accountant-General of the Court of Chancery, and in either case such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes, namely, the purchase or redemption of the land tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or the purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or the payment to any person becoming absolutely entitled.

Sect. 24 provides that the application of the money in manner aforesaid may, if the Court so direct, be made by the trustees (if any) without application to the Court, or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Sect. 25 provides that, until the money can be applied as aforesaid, the same shall be from time to time invested in Exchequer bills, or in Three per centum Consolidated Bank Annuities, as the Court shall think fit; and the interest and dividends of such Exchequer bills or Bank Annuities shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

These sections are now replaced by ss. 34 to 36 of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18).

The effect of these sections is that the unsold land remains real estate, and the proceeds of sale remain real estate until ordered to be paid out to a person becoming absolutely entitled: *Foster* v. *Foster* (1); *Mildmay* v. *Quicke* (2); *In re Barker.* (3)

[SWINFEN EADY J. Those were all cases of persons under disability.]

That is so, but the sections are incorporated without reference to disability.

The dicta of Jessel M.R. in *Wallace* v. *Greenwood* (4) to the effect that the order for sale operates as a conversion even in the case of an infant were pronounced without reference to the incorporated sections, and in *In re Norton* (5) it was held, notwithstanding these dicta, that an infant's share was unconverted though he had requested a sale. In *In re Dodson* (6) Eve J. held that the share of a person sui juris and absolutely entitled was converted by the order for sale in a partition action. But his attention was not called to the express provisions of the Settled Estates Act, 1856, ss. 23 to 25, and he merely followed the dicta in *Wallace* v. *Greenwood* (4) and the decisions in *Arnold* v.

(1) (1875) 1 Ch. D. 588.
(2) (1877) 6 Ch. D. 553.
(3) 17 Ch. D. 241, 243.
(4) (1880) 16 Ch. D. 362, 365.
(5) [1900] 1 Ch. 101.
(6) [1908] 2 Ch. 638.

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Dixon (1) and *Hyett* v. *Mekin* (2), where the orders for sale were made in administration actions to which the above sections are inapplicable. In *Fauntleroy* v. *Beebe* (3) the order for sale was made in an administration action. The Court of Appeal treated *In re Dodson* (4) as directly in point and approved the decision without having their attention called to the provisions of the Settled Estates Act, 1856.

Hon. Frank Russell, K.C., and *A. C. Nesbitt*, for the customary heir of James Herbert. If the incorporated sections are considered apart from the authorities, it is clear that there is no conversion. Subject to that observation we adopt the above argument.

Hon. E. C. Macnaghten, K.C., and *Crowdy*, for the widow of James Herbert. No administration has been taken out to James Herbert's estate, but we are instructed to argue the general question in favour of conversion. The suggestion that the incorporated sections should be considered apart from the authorities is forty years too late. The case is concluded by authority. The exact point was decided by Eve J. in *In re Dodson* (4) and his decision was approved in *Fauntleroy* v. *Beebe*. (3) *In re Dodson* (4) was very fully argued. The distinction between administration actions and partition actions was clearly pointed out. The statement in Carson's Real Property Statutes, 1st ed. p. 734, was referred to both by counsel and the judge. It is a note to s. 8 of the Partition Act, 1868, which is set out on p. 734, and the note commences "Sections 34 to 36 of the S. E. Act, 1877 (which correspond to sections 23 to 25 of the S. E. Act, 1856), are given at length ante, pp. 638 et seq." With the book in his hand it is inconceivable that the judge did not refer to the incorporated sections or their equivalents. These sections really only apply to persons under disability as the phrase "person becoming absolutely entitled" refers to a person becoming subsequently absolutely entitled: *In re Barker*. (5)

There are other authorities directly in point. In *In re Pickard* (6) a co-heiress was sui juris at the date of the order for sale in 1880. The property was sold in 1880, and in 1882 an

(1) L. R. 19 Eq. 113.
(2) (1884) 25 Ch. D. 735.
(3) [1911] 2 Ch. 257, 264, 266.
(4) [1908] 2 Ch. 638.
(5) 17 Ch. D. 241, 243.
(6) [1885] W. N. 137; 53 L. T. 293

order was made for payment of her share out of Court, but she left it in Court. She subsequently became lunatic and the fund was transferred into lunacy. On her death it was held that the share was personal estate. In *Mordaunt* v. *Benwell* (1) the shares of money in Court and unsold land of three intestates who were infants when the order for sale was made descended to their father as their heir-at-law. The property was all sold during his lifetime. He died while the money was still in Court, and it was held that it formed part of his personal estate. In *Arnold* v. *Dixon* (2) there was no doubt an administration action, but the order for sale was made under the Partition Act, 1868. This appears from the language of the order, and the report in the *Weekly Reporter* (3) states it in terms. In that case a person sui juris died intestate before the sale was effected. The property was then sold and the proceeds paid into Court. It was held that his share was personal estate and went to his next of kin. There was nothing there except the order for sale to effect the conversion. The authorities on persons under disability are in our favour, as if our opponents' arguments are correct the question of disability was absolutely immaterial.

J. W. Greig, for an executor and trustee of John Herbert and the executors and trustees of his wife, Jane Herbert, adopted the same arguments.

Luxmoore, *Garsia*, *B. A. Hall*, and *Taylour*, for other parties.

Micklem, *K.C.*, in reply. In *In re Pickard* (4) there was an order for sale followed by an actual sale and an order for payment out. This obviously effected a conversion and put an end to any equity to reconversion. In his judgment Pearson J. is clearly referring to the order of 1882, which was the order for payment out. He does not decide that the property was converted by the order for sale. In *Mordaunt* v. *Benwell* (1) the infants attained twenty-one and became absolutely entitled, but their shares of money and unsold land remained real estate and descended to their father as heir-at-law. The land was all sold during his lifetime, so that at his death the shares were represented by money in Court. In his hands they were personalty, as there

(1) 19 Ch. D. 302.
(2) L. R. 19 Eq. 113.
(3) 23 W. R. 314.
(4) [1885] W. N. 137; 53 L. T. 293.

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was no equity to reconversion as between his real and personal representatives. The Partition Act, 1868, s. 8, and the incorporated sections clearly apply to persons sui juris, and treat the money as land until payable out to a person becoming absolutely entitled. It is then paid out to him in his capacity of landowner, though in his hands it is money.

[SWINFEN EADY J. In the present case John Herbert did not "become" absolutely entitled after the order. He was absolutely entitled at the date of the order and he requested a sale.]

That merely shews he preferred a sale to partition. It does not shew that he elected to treat the land or the proceeds as money. Letters of administration cannot be granted in respect of money in Court representing the proceeds of sale of land sold under the Settled Estates Acts: *In the Goods of Lloyd.* (1)

[SWINFEN EADY J. That was the property of a married woman. It was probably a case of disability.]

In *Steed* v. *Preece* (2) Jessel M.R. held that an infant's share was converted by an actual sale in an administration action, the ratio decidendi being that the parties claiming must take the property as they found it, there being no equity to reconversion. In *Arnold* v. *Dixon* (3) Hall V.-C., while purporting to follow *Steed* v. *Preece* (2), held that the share of a person absolutely entitled who died before the sale descended as personalty. Apart from the fact that the ratio decidendi of *Steed* v. *Preece* (2) pointed the other way even if the sale had been made in an administration action, it now appears that the sale was made under the Partition Act and that the equity to reconversion was entirely overlooked. In *Foster* v. *Foster* (4) Jessel M.R. expressly distinguished his own decision in *Steed* v. *Preece* (2) on the ground of this equity to reconversion. The incorporated sections of the Settled Estates Act, 1856, apply to all sales effected under the Partition Acts: *In re Barker.* (5)

SWINFEN EADY J. (after stating the facts). The order for sale having been made under the Partition Acts, it is contended that

(1) (1884) 9 P. D. 65.
(2) (1874) L. R. 18 Eq. 192.
(3) L. R. 19 Eq. 113.
(4) 1 Ch. D. 588.
(5) 17 Ch. D. 241, 243.

the effect of reading ss. 23 to 25 of the Settled Estates Act, 1856, into s. 8 of the Partition Act, 1868, is that the unsold land remains land and the proceeds of sale are impressed with a trust for reinvestment in land, and in the meantime the income is to go as rents and profits of land would go; and further it is said that the order for sale does not work a conversion.

Now a great many cases have been decided under the Partition Acts, and in these cases a distinction is drawn between the sale of a share of a person sui juris and a person under disability, e.g., infancy, coverture, or lunacy. The broad general principle is stated by James L.J. in *In re Barker.* (1) He says: "There seems to me to be a broad general principle underlying all these questions, which is this, that where property is taken compulsorily from any person who is not sui juris, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever." Then he deals with the particular case.

In three cases that have been cited where there was an order for sale under the Partition Acts, it has been held that the share of a person sui juris devolved as personal estate. The first case is *In re Pickard* (2), a decision of Pearson J. In that case there had been an order for sale and an order for payment out of Court of the proceeds of sale, but no actual payment, and then the person entitled to the money became of unsound mind. Then the question arose as to the subsequent devolution of the fund, and Pearson J. treated the orders—it is not quite clear whether he meant the order for sale or the order for payment or the two orders together, but it may well be that he meant the order for sale only—as effecting a conversion. At all events he regarded the properties as converted although the fund was still in Court and had not actually been paid out, and it devolved as personal estate.

(1) 17 Ch. D. 241, 243. (2) [1885] W. N. 137; 53 L. T. 293.

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The second case is *Arnold* v. *Dixon* (1), before Hall V.-C. That is the case where there was an order for sale and then the death before sale of the person absolutely entitled to the share. Then after his death the sale took place, and there was a question whether the proceeds of sale passed to his heir-at-law or to his next of kin, and the Vice-Chancellor held that they passed to the next of kin. It will be observed that the only step in that case to effect the conversion was the order for sale. There was no subsequent order. There was some doubt whether, having regard to the report of the case in the *Law Reports*, the order for sale was made under the Partition Act, because the report begins, "The bill in this suit was filed for the administration of the estates of Margaret and Sarah Dixon, sisters, deceased, and for a partition." I think the inference from the report in the *Law Reports* is that the order for sale was made under the Partition Act because the language used is "the Court, being of opinion that a sale would be more beneficial"—that is, more beneficial than a partition and obviously taken from the Partition Act; but it is made clear by referring to the report of the same case in the *Weekly Reporter* (2), where it states in terms that the Court ordered the sale in accordance with the provisions of the Partition Act, 1868. That, therefore, is a clear decision that the order for sale in itself effected the conversion. That is all that there was in that case, and it was a sale of the share of a person sui juris.

The third case is *Mordaunt* v. *Benwell.* (3) In that case there was a decree for sale in a partition action where three children were entitled, and at the date of the decree for sale all the children were infants and so under disability. The property was subsequently sold. The children died after attaining majority. Their father was their heir-at-law. The father died, and then after the father's death the question was whether the proceeds of sale passed as part of his real estate or part of his personal estate. It was held by Fry J. that the father took as heir-at-law of the three children. There was no conversion of a share because at the date of the decree for sale the parties were infants; but with regard to

(1) L. R. 19 Eq. 113. (2) 23 W. R. 314.
(3) 19 Ch. D. 302, 304.

the subsequent devolution it was held that the father's interest passed as his personal estate. Fry J. says, "The shares of the deceased children were then in the condition of money and . . . . they could not be reinvested in land without his consent . . . . He never gave any consent to the reinvestment of the money in land . . . . and as between his real and personal representatives it must go as money."

There are three cases, therefore, in which it has been held that the share of a person sui juris devolves as personal estate. Then there is a recent decision before Eve J. where the precise question was decided, namely, *In re Dodson.* (1) In terms it was decided that "An order for sale properly made in a partition action operates as a conversion of the share of a person sui juris as from the date of the order, and, therefore, on the death before sale of the person entitled, his share of the unsold real estate will devolve as personalty." That case was recently before the Court of Appeal in *Fauntleroy* v. *Beebe.* (2) Cozens-Hardy M.R. refers to *In re Dodson* (1) and other cases, and has no doubt as to the accuracy of the decision. He refers to another case, *Hyett* v. *Mekin* (3), and says: "That was twenty-six years ago, and as recently as the year 1908 precisely the same point was decided by Eve J. in the case of *In re Dodson.* (1) Even if I had a doubt, which I have not, as to the accuracy of these decisions, I should hesitate long before I felt justified in overruling them in view of the undoubted fact that many people must have acted upon them for a great many years." In a supplementary judgment he says, again referring to another case, *In re Stinson's Estate* (4), "That case tends to support our decision in the present case; but it is not so directly in point as *Arnold* v. *Dixon* (5), *Hyett* v. *Mekin* (3), and *In re Dodson.*" (1) So I have a recent decision of Eve J. on the very point in terms expressly approved by the Court of Appeal.

Having regard to that long current of authority and the absence of any decision to the contrary as regards the share of a person sui juris, the only decisions to the contrary being

(1) [1908] 2 Ch. 638.
(2) [1911] 2 Ch. 257, 264, 266.
(3) 25 Ch. D. 735.
(4) [1910] 1 I. R. 13.
(5) L. R. 19 Eq. 113.

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cases of disability which stand on a different footing, I am of opinion that the order for sale worked a conversion and I must declare accordingly. This declaration only extends to the case of persons who were sui juris at the date of the order for sale.

Micklem, K.C. There is a question as to the share of Ann Daniel, one of the parties originally entitled. She was married to her first husband, Daniel Herbert Daniel, on January 1, 1874, so that at the date of the action to which she was not a party she was under coverture. She had liberty to attend and was represented when the order for sale was made, but she did not request a sale under s. 6 of the Partition Act, 1876. Her first husband died on January 29, 1895, and she became and remained discovert and sui juris until August 27, 1897, when she married her second husband, James Thompson. On December 27, 1901, she died intestate, and on August 26, 1911, James Thompson took out letters of administration to her estate. James Thompson died on March 31, 1912, and on May 7, 1912, his widow and administratrix, Laura Thompson, took out letters of administration de bonis non to the estate of Ann Daniel (afterwards Thompson). The question is whether her share was converted on her becoming sui juris in 1895.

Hon. Frank Russell, K.C., and *A. C. Nesbitt*, for the customary heirs of Ann Daniel. In the absence of a formal request for sale under s. 6 of the Partition Act, 1876, Ann Daniel's share was not converted by the order for sale: *Wallace* v. *Greenwood.* (1) It therefore remained real estate. The mere fact that she became sui juris in 1895 did not convert it into personalty, and there is no evidence of any election in that behalf. On the contrary, on November 13, 1896, she and other persons sui juris entered into an agreement that steps should be taken for a stay of proceedings and discharge of the order for sale.

Taylour, for the administratrix de bonis non of Ann Daniel. The share was converted the moment Ann Daniel became sui juris, and the parties who were sui juris could not by themselves effect any reconversion.

(1) 16 Ch. D. 362, 365.

SWINFEN EADY J. Ann Daniel's share remains real estate. It was not converted by the order for sale. It was impressed with the character of real estate, and the mere fact that she became discovert on the death of her first husband is not of itself sufficient to shew any election to take it as personal estate. This point is really covered by *Mordaunt* v. *Benwell* (1) as the infants whose shares were not converted by the order for sale subsequently attained majority; nevertheless their shares went to their father as heir-at-law.

Hon. Frank Russell, K.C. One of my clients claims as customary heir of his father, James Herbert, who was one of the customary heirs of Ann Daniel. It has been suggested that James Herbert's request for sale may have operated to convert the derivative share that he subsequently acquired as a customary heir of Ann Daniel, whose share was not converted. This cannot be so.

Hon. E. C. Macnaghten, K.C. I agree. It remains realty.

SWINFEN EADY J. Very well. That is agreed.

Solicitors: *Schultz & Son, for Gwilym James, Charles & Davies, Merthyr Tydfil; Le Brasseur & Oakley, for Bowen & Son, Pontypool; Le Brasseur & Oakley, for Le Brasseur & Co., Newport, Mon.; Carthew, Wheeler & Hancock, for James Morgan & Co., Cardiff.*

(1) 19 Ch. D. 302.

G. R. A.

NEVILLE J.
1912
May 10.

MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* GREENSMITH.

[1911 S. 2203.]

Inclosure Act—Lords of the Manor—Recital of Title—Commons and Wastes—Underlying Minerals—Compensation for Rights "in and to the soil"—Saving Clause—Allotments in Fee Simple—Whether Minerals reserved—Norton Inclosure Act, 1814 (54 *Geo.* 3, *c. cxxxvi.*), *preamble; ss.* 12, 17, 28, 66.

A special Inclosure Act, which incorporated the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), recited that the plaintiffs as the lords of a manor were "the owners of the soil of the commons and wastes within the manor, and of the mines and minerals therein," and directed that a certain portion of the commons and wastes should be allotted to the plaintiffs as lords of the manor as a full compensation for "their right to the soil of the said commons and wastes," and that the residue of the commons and wastes should be allotted to and amongst the persons having right of common on the commons and wastes, and directed that all parties should hold their respective allotments in severalty freed and discharged from all rights of common, and saved to the plaintiffs all their estates rights and interests in the commons and wastes directed to be inclosed except such rights and interests as the inclosure thereby authorized required to be barred, destroyed, or extinguished. Excepting the above recital, the Act and the award were silent as to mines and minerals:—

Held, that the word "soil" was used throughout the Act not in its widest sense but in the restricted sense of the surface of the soil, and that the allottees of the commons and wastes took an estate in fee simple only in the surface of their allotments, the underlying mines and minerals being reserved to the lords.

THE Act 54 Geo. 3, c. cxxxvi., which was passed "for inclosing lands in the manors or townships of Campsall, Norton, and Askern, in the county of York,"—after reciting (inter alia) that there were within the manor or township of Norton in the parish of Campsall aforesaid open and common fields, commons, wastes, and other commonable lands which contained together by estimation 1600 acres or thereabouts; and that the Master and Fellows of St. Catherine's (1) College, Cambridge, in right of the college, "are lords of the manor of Norton aforesaid, and as such are owners of the soil of the commons and waste grounds within that township, and of the mines and minerals therein"; and that the Master and Fellows of St. Catherine's

(1) *Sic* in the preamble; in the body of the Act the spelling is correct.

College aforesaid and divers other persons were owners and proprietors of lands and grounds in the open common fields and meadows within the aforesaid several and respective townships, and reciting the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109); and that the lands and grounds of the respective proprietors in the said open and common fields and meadows lay much intermixed and dispersed in small parcels and were inconveniently situate for occupation, and the same and also the commons, wastes, and other commonable lands and grounds in the said several townships were, "in their present state, incapable of any considerable improvement; and it would be of great benefit and advantage to all persons interested therein respectively, if all the said open common fields . . . . commons, wastes and other commonable lands and grounds, within each of the aforesaid respective townships, were divided and inclosed, and specific parts thereof allotted to the several proprietors thereof and persons interested therein respectively, in each respective township, in proportion to their respective rights and interests" in manner thereinafter directed—appointed commissioners to carry the Act and the recited Act into execution "except such parts of the said recited Act as are hereby altered or varied, and under and subject to such of the regulations and restrictions contained in the said recited Act as are not repugnant to the provisions of this Act."

Sect. 12 enacted that when the division and allotment of the said commons and wastes and open fields had been ascertained and established by the award of the commissioners "all rights of common or average of what nature or kind soever" to which the same were then subject should absolutely cease and be extinguished.

Sect. 13 empowered the commissioners to suspend or extinguish rights of common until the allotments were made.

Sect. 14 enacted that all encroachments which should have been made upon the said commons and wastes within twenty years last before January 1, 1813, should be deemed part of the said commons and wastes to be inclosed and allotted by virtue of the Act without regard to the value of any erections thereon or improvements made thereto; provided that in all cases when any

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such encroachments should have been made, and the person or persons who were in possession or receipt of the rents thereof were not entitled to any allotment of the said commons and wastes, the commissioners might award or allot such encroachments to the person or persons who at the time of making such allotments should be in possession or receipt of the rents of such encroachments, "they paying the price or value of the lands, to be set upon them by the said commissioners, without any regard had to the value of any erections thereon, or improvements made thereto; and they shall, from and after the execution of the said award, be discharged from all rents which may have been set upon them by the lord of the manor where the same are situate, and shall for ever after be held as freehold in fee simple."

By s. 17 the commissioners were authorized to allot one or more pieces of ground, not exceeding in the whole four acres, within and for the use of each of the said manors as and for public stone quarries for the purpose of digging and getting stone and other material for the making and repairing of the highways to be set out and appointed over the said open fields, commons, and wastes thereby directed to be divided, inclosed and allotted, and "the soil and surface of the lands and grounds to be set out for public stone quarries aforesaid" should after the execution of the award of the commissioners be vested in the surveyor of the highways for the time being within the township wherein such quarries should be situate.

Sect. 25 provided for the division and allotment of Barnsdale Common situate in the manors or townships of Norton and Campsall.

Sect. 28 enacted that the commissioners should allot and award unto the Master and Fellows of St. Catharine's College, as lords of the manor of Norton, such part and parcel of the remainder of the wastes and commons within the manor of Norton "as (quantity, quality and situation considered) shall in their judgment be equal to one eighteenth part in value thereof, in lieu of and as a full and sufficient recompence for their right to the soil" of the said commons and wastes.

Sect. 32 enacted that one moiety in value of the residue of the commons and wastes within the manor of Norton should be

allotted and awarded amongst the several and respective owners and proprietors of messuages, cottages, and tofts within the same manor, having in respect thereof right of common on the said commons and wastes, in proportion to the number and without regarding the value of their respective messuages, cottages, or tofts, and the other moiety in value of such residue of the said commons or wastes amongst the several owners and proprietors of any lands or grounds whatsoever, having in respect thereof rights of common on the said commons and wastes within the same manor, in proportion and according to the value of their respective lands and grounds, "in full bar and satisfaction of and for their several and respective rights and interests upon" the said commons or wastes in the same manor, "and that in ascertaining the value of the several and respective parcels of wood land or ground within the said manor or township, the said commissioners shall and they are hereby required to estimate the same according to the nature and quality of the soil thereof, as if no wood was growing thereon."

Sect. 33 enacted that the commissioners should divide, allot, and award the residue of the open fields and pastures within the manor of Norton "unto and amongst the several and respective owners and proprietors thereof, according to their several and respective lands, grounds, rights and interests therein, in such manner, shares, and proportions as the said commissioners shall in their judgment think just and equitable in full recompence and satisfaction for their several and respective rights and interests which they now severally and respectively have and enjoy in and upon the said open fields, ings, meadows and pastures hereby directed to be divided and inclosed, situate in the said township of Norton."

Sect. 38 provided that when the commissioners should have made their award, all persons and bodies corporate should accept the same within one month, and should "hold and enjoy the said respective allotments in severalty, freed and discharged of and from all claim or right of common or average whatsoever."

Sect. 55 provided that the commissioners might set out and allot parts of the said commons and wastes to raise the expenses

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incurred in carrying the Act into execution, and might sell and convey such allotments to the purchaser or purchasers thereof, his or their heirs and assigns, in fee simple.

Sect. 62 provided for the making of the award and directed the commissioners to state in their award the quantity of land allotted with the tenure and nature thereof.

Sect. 66: "Saving always . . . . to all persons, bodies politic and corporate, their respective heirs, successors, executors, administrators and assigns (other than and except the several persons, bodies politic and corporate, to whom any allotment or other compensation shall be made or provided by virtue of this Act, in respect of the interest or property for which such allotment or compensation shall be made, their respective heirs, successors, executors, administrators and assigns, and except such other rights and interests as the intent and purpose of the inclosure hereby authorized shall absolutely require to be barred, destroyed or extinguished, by virtue of this Act) all such estates, rights, title, and interests, as they, every or any of them, had or enjoyed, of, in, to or out of the said commons, wastes and open fields hereby directed to be inclosed, before the passing of this Act, or could or might have had and enjoyed if this Act had not been made."

The commissioners by their award dated February 13, 1818, after reciting (amongst other things) s. 28 of the Act, allotted and awarded to the Masters and Fellows of St. Catharine's College, Cambridge, "as a full compensation to them for their right and interest in and to the soil of the said commons and wastes" a parcel of land being part of the commons in Norton aforesaid containing 34a. 1r. 26p., which parcel of land "is in our judgment (quantity quality and situation considered) equal in value to one eighteenth part of the remainder of the said commons and waste grounds within the manor or township of Norton aforesaid by the said recited Act directed to be divided and inclosed," and by the award the residue of the open fields, commons, and wastes in Norton aforesaid were divided and allotted to and amongst the several owners and proprietors (including the Master and Fellows of St. Catharine's College) according to their several and respective rights and interests therein. And it was

thereby declared that the allotments or parcels of land so awarded to St. Catharine's College were "in full bar and satisfaction for all their rights and interests in the several open fields commons and waste grounds" by the Act directed to be divided and inclosed, and by the award divers parcels of land in Norton aforesaid were allotted and awarded to (amongst other persons) George Carnelly, and it was thereby declared that the several allotments so awarded to George Carnelly were in full bar and satisfaction for all his rights and interests in the several open fields, commons, and wastes by the Act directed to be divided and inclosed. And it was thereby declared that all the several allotments thereinbefore awarded were of the nature or tenure of freehold and had been accepted by the several persons to whom the same were respectively allotted and awarded, their heirs, executors, administrators, successors, and assigns, and were so awarded in full of all their respective rights and interests in the several open fields, commons, and wastes by the Act directed to be divided and inclosed, and should be held and enjoyed by the respective parties or persons to whom the same were so awarded and their respective heirs, successors, and assigns according to their several and respective estates and interests in the lands and hereditaments in respect whereof the same were so allotted and awarded.

The allotments so awarded to George Carnelly included lands in Norton Common containing about 18 acres, hereafter called "the 18 acre allotment."

In October, 1910, the then owner of "the 18 acre allotment" sold it by public auction together with the mines and minerals thereunder to the defendants.

Except the reference to mines and minerals as recited in the preamble of the Norton Inclosure Act, that Act and the award were silent as to the mines and minerals underlying Norton Common. A large colliery had recently been started near Norton Common, and the ownership and value of the mines and minerals underlying the common came into prominence.

The plaintiffs, as lords of the manor of Norton, claimed that upon the true construction of the special Act and award they were entitled to the mines and minerals under "the 18 acre

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The defendants by their defence pleaded that upon the true construction of the Act all the mines and minerals underlying such parts of the commons and wastes within the manor of Norton as were in pursuance of the Act and by the award allotted and awarded otherwise than to the plaintiffs as lords of the said manor became by virtue of the Act and award vested in the several persons to whom the same respectively were so allotted and awarded absolutely discharged (except in the case of copyhold allotments) from all estate, right, title, interest or claim of the lords of the manor; and that "the 18 acre allotment" was allotted and awarded to George Carnelly, their predecessor in title, as freehold, and that they were by virtue of the Act and award seized thereof and of the mines and minerals thereunder as parcel thereof in fee simple.

Buckmaster, K.C., and *MacSwinney*, for the plaintiffs. The question depends on the meaning to be given to the word "soil" in the special Act. It is an ambiguous word. In *Townley* v. *Gibson* (1) it was held to mean everything above and below the surface and to include minerals, but in that case there was no preamble in the special Act, and no reservation of minerals. In *Pretty* v. *Solly* (2) mines were expressly reserved and it was held to mean the surface only. The object of the Act was to improve land. The preamble recites that the plaintiffs are owners of the soil of the commons and wastes of the manor and of the mines and minerals therein. The recital draws a distinction between the soil and the underlying minerals and controls the ordinary meaning of soil throughout the Act, and read with s. 66 is equivalent to a reservation of the mines and minerals under the commons and wastes of the manor, and the compensation given to the plaintiffs by s. 28 for their rights and interest in the soil is confined to their rights and interest in the surface. The case most like the present is *Duke of Buccleuch* v. *Wakefield* (3), where the special Act contained a recital as to the ownership of the mines identical with

(1) (1788) 2 T. R. 701. (2) (1859) 26 Beav. 606, 613.
(3) (1870) L. R. 4 H. L. 377.

that in this case, and the 24th clause compensating the lord of the manor for his rights in the soil was similar to clause 28 in the present case, but the saving clause expressly reserved minerals. The dispute there was as to minerals under the lands sold in fee simple to pay the expenses of the Act, and it was held that the purchaser was not entitled to the minerals. But Lord Chelmsford in his judgment, after referring to the arguments on the word "soil," says (1): "But whatever may be the force of this word, unqualified and unexplained, it cannot have the effect contended for as it is used in the special Act. It is, perhaps, unnecessary to go farther than to the first section of the Act for proof of this." Then he read the recital, and continued:— "I should have thought, as the soil and the mines are here expressly distinguished from each other, that the 24th clause, considered alone, would have been sufficient to show that the compensation to the lord was confined to his right and interest in the surface soil," and then he adds that the express reservation in the saving clause removed all doubts. That passage directly covers the present case, and is a distinct decision in the plaintiffs' favour, and it is submitted that in the present case the recital and particularly ss. 12, 17, 28, and 66 shew that throughout the Act surface rights alone are dealt with.

Jenkins, K.C., and *J. G. Wood*, for the defendants. The Act must be considered as a whole. It is an Act dealing not only with commons and wastes but also with open fields and other lands. Open fields are explained in Elton on Commons, p. 29. The recital that the plaintiffs are owners of the commons and wastes and of the mines and minerals therein is only descriptive and a statement of their title and is not intended to operate as a reservation of the mines and minerals in their favour. Throughout the Act and the award the commons and wastes and open fields and other lands are dealt with in the same way and allotted in fee simple. It is clear that the mines and minerals under the open fields and other lands are not reserved, and there is nothing in the Act which says that you are to discriminate and that in the one case minerals are reserved and that in the other they are not. The recital is insufficient without

(1) L. R. 4 H. L. 404.

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a special reservation in the Act to restrict the primary meaning of the word "soil." There is no case in which such a recital by itself has been held to operate as a reservation, and clause 66 is insufficient for the purpose. Lord Chelmsford's observation in *Duke of Buccleuch* v. *Wakefield* (1) is a mere dictum. In that case and *Pretty* v. *Solly* (2) there was an express reservation of minerals in the Act. This case falls within the principle of *Townley* v. *Gibson* (3) and *Sowerby* v. *Smith.* (4)

Buckmaster, K.C., in reply.

NEVILLE J. I think that in construing an Act of this kind one is entitled to take into consideration what it was that the Legislature was dealing with. Prima facie one would not expect to find in an Inclosure Act, which undoubtedly was for the purpose of facilitating agriculture, an unnecessary alteration in the ownership of the minerals underlying the surface. On the other hand, in view of the decision in *Townley* v. *Gibson* (3), it is clear, I think, that if the Act of Parliament referred to the soil without any indication being found in the Act that that word was used in other than its fullest sense, it would be impossible to hold that the allottees under the commissioners' award did not take the minerals underlying the allotment made to them as well as the surface. Bearing these things in mind I have to determine whether, in the Act upon which I have to put a construction, the word "soil" was intended in its widest sense, or whether there are indications enabling me to say that the Legislature used it in a more restricted sense. The present Act extends somewhat beyond the ordinary Inclosure Act, inasmuch as, according to the recitals, in addition to the fact that there were commoners in the manor of Norton exercising rights over wastes of the manor, there were also certain fields called "open fields,"—it does not very much matter what their character was,—in respect of which there were rights of others than the owners. They are recited to lie much intermixed and to be inconveniently situate for occupation. The Act not only provides for inclosure in

(1) L. R. 4 H. L. 377, 404.
(2) 26 Beav. 606.
(3) 2 T. R. 701.
(4) (1874) L. R. 9 C. P. 524, 530, 531.

the ordinary sense, that is, dividing up the commons and wastes of the manor between the commoners and the lord, but also for a redistribution of these open fields amongst the persons interested in them. Therefore the Act had to provide for the redistribution of these open fields amongst the owners, and for a division up of the commons and wastes of the manor between the lord and the tenants of the manor having commonable rights; incidentally it had to provide for the tithes which existed upon lands to be dealt with; and, finally, for the public or quasi-public rights which were exercised on behalf of the public by the surveyor of highways. All those things are dealt with by the Act. The question really comes to this: What is the intention of the recital which says that St. Catharine's College are the owners of the soil of the commons and waste grounds in the township of Norton and of the mines and minerals therein? Is the introduction of the words "and of the mines and minerals therein" simply a more elaborate description of the soil, or is it intended to draw a distinction between the ownership of the soil and the ownership of the mines and minerals? In my opinion, used as I find it and having regard to the other provisions of the Act, it is intended to draw a distinction between the soil and the mines and minerals underlying it. I find that when one comes to the division of the open fields, they are allotted to the various owners without any reference to the ownership of the soil, but when one comes to s. 28, which deals with the consideration given to the lords of the manor, what is given to them is given "as a full and sufficient recompence for their right to the soil of the said commons and waste grounds in the manor or township of Norton aforesaid." Then it is said, quite truly, that the Act contemplates a vesting of the fee simple of the lands allotted, whether it be wastes or whether it be the open fields, in the persons to whom they are allotted by the commissioners. But I do not think that that really affords any assistance in construing the Act, because undoubtedly the allottees would take the fee simple, whether they take it in the surface alone or whether they take it in the mines and minerals as well. I may point out that in s. 32 of the general Inclosure Act, 41 Geo. 3, c. 109, which is set out in the case of *Duke*

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of Buccleuch v. *Wakefield* (1), it is provided that where the special Act provides for sale of part of the lands for the provision of expenses, then, upon payment of the purchase-money, the land shall be "absolutely discharged of and from all common and other right thereon or therein, and be vested in fee simple in, and be inclosed, and thenceforth held in severalty by such purchaser or purchasers thereof respectively, as his, her, or their private and absolute property," and when you look at s. 23 of the special Act in that case you find the direction for sale unaccompanied by any direction that the part sold shall be vested in the purchaser with a reservation of the mines and minerals. Then when you come to the 29th clause of the special Act there, referring to allotments to the customary tenants of the manor generally, you find that they are to hold subject nevertheless to the rights of the lady of the manor to the mines and minerals and quarries in or under the same; but notwithstanding that direction in clause 23 it was held that the sale of the land necessary for the purpose of raising the expenses of the Act was not a sale of the mines and minerals. Therefore I think the question one has to consider is not what is the amount of the estate which the allottees take under the allotment, but what it is they take the estate in. In my opinion, in the present case, they take an estate in fee simple with regard to the waste lands and commons in the soil, not used in the widest sense but used in the sense of the surface, and not in the mines and minerals. I think, therefore, that the plaintiffs are entitled to a declaration to that effect.

Solicitors for plaintiffs: *Cole & Jackson, for Eaden, Spearing & Raynes, Cambridge.*

Solicitors for defendants: *Bell, Brodrick & Gray, for Rodgers & Co., Sheffield.*

(1) L. R. 4 H. L. 377, 379.

H. L. F.

GRIFFITH *v.* RICHARD CLAY & SONS, LIMITED.

C. A. 1912 May 9.

[1910 G. 2292.]

Ancient Lights—Obstruction—Measure of Damages—Site Value.

The plaintiff was the owner of two houses fronting upon a street, and the windows facing the street were ancient lights. He was also the owner of a piece of land immediately at the rear of and adjoining the houses. The defendants erected a building on the opposite side of the street and thereby obstructed the plaintiff's ancient lights. In an action for damages it appeared that the plaintiff's houses were old and dilapidated and would soon have to be demolished; that the neighbourhood was no longer residential, but adapted for factories and workshops; that the site of the houses, together with the piece of land at the rear, would form a building site suitable for a warehouse or factory; and that the value of this building site as a whole would be diminished by the obstruction to light in the front:—

Held, that the damages recoverable by the plaintiff were not limited to the depreciation in the value of the houses, but extended to the diminution in value of the whole of the plaintiff's premises considered as one building site.

Decision of Neville J. [1912] 1 Ch. 291, affirmed.

Appeal from a decision of Neville J. (1)

The action was for an injunction and damages for the obstruction by the defendants of the plaintiff's ancient lights.

The plaintiff was the owner of two freehold dwelling-houses fronting upon Brunswick Street, Blackfriars, and numbered 62 and 63, and of a piece of land at the rear of the houses upon a part of which was a small warehouse known as 63A. Nos. 62 and 63 were let as private tenements at low weekly rentals. The land at the rear together with the warehouse was let separately to other tenants, the only access to it being through a narrow passage from Brunswick Street by the side of No. 63.

Brunswick Street was about thirty-four feet wide. Opposite to the plaintiff's premises originally stood an old saw-mill and timber yard. The saw-mill ran the whole length of the street facing the plaintiff's premises and had a front elevation of about seventeen feet six inches. In 1910 the defendant company

(1) [1912] 1 Ch. 291.

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acquired the saw-mill and timber yard, demolished the saw-mill, and on its site erected new buildings facing the plaintiff's premises to a height of sixty-three feet, thereby obstructing the access of light to the plaintiff's windows in Nos. 62 and 63. The plaintiff then brought this action, alleging that his windows were ancient lights and claiming a mandatory injunction and damages. The defendant company by their defence admitted the obstruction to the plaintiff's ancient lights, but submitted that the case was not one for a mandatory injunction, but for damages, and paid 150*l.* into Court to satisfy the plaintiff's claim.

On motion for judgment upon admissions in the pleadings it was agreed, the plaintiff waiving his claim to an injunction, that the issue of damages should be dealt with by the Court. Upon the trial of that issue it appeared that the plaintiff's houses were very old and dilapidated and would soon have to be demolished; that the neighbourhood was no longer suitable for residential purposes; and that the whole of the plaintiff's property together formed a building site of about 2050 superficial square feet, suitable for the erection of a warehouse or factory. There was evidence to the effect that the depreciation in value of the plaintiff's building site by reason of the obstruction to the ancient lights in front was from 250*l.* to 350*l.*

Neville J. held that in assessing the damages he was entitled to take into consideration not only the depreciation in value of the houses Nos. 62 and 63, but also the diminution in value of the whole of the plaintiff's premises considered as one building site. Upon that footing he assessed the damages at 200*l.* and gave the plaintiff the costs of the action. From that decision the defendants appealed.

Jenkins, K.C., and *Vernon*, for the appellants. In assessing the damages recoverable by the plaintiff the Court will limit them to the diminution in value caused by the obstruction of light to the dominant tenement itself, and will not extend them to the injury done to the whole of the plaintiff's premises considered as one building site.

Damages for diminution in site value are too remote. A tort-feasor is only liable for the reasonable consequences of his act.

[BUCKLEY L.J. Do you agree that the measure of the damages ought to be the pecuniary equivalent of an injunction restraining the obstruction?]

No. What the Court has to consider is the interest of the owner of the dominant tenement as such. He may suffer a good deal of damage in respect of which he cannot recover. The damages must be confined to the injury suffered in respect of the dominant tenement.

The damages which it is suggested the plaintiff is entitled to in this case are too remote. *The Notting Hill* (1) illustrates the general principle to be applied.

[KENNEDY L.J. referred to *The Argentino.* (2)]

The damage must be the direct and natural consequence of the act complained of: *Cobb* v. *Great Western Ry. Co.* (3)

An action for obstruction of light is now simply an action for nuisance. The plaintiff must shew that his premises have been rendered substantially less convenient. Damages arrived at according to the measure adopted by Neville J. cannot be recovered from the defendants.

[COZENS-HARDY M.R. referred to *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools.* (4)]

The Court has to consider what the parties might reasonably suppose would be the result of the tort or breach of contract: Bullen and Leake's Precedents of Pleadings, 3rd ed. p. 347. The actionable wrong here is the interference with property. The question is can the plaintiff say, "Having regard to the injury done to the particular property I have sustained so much damage, but if its effect on other property belonging to me is taken into account the damage is greater and I am entitled to recover in respect of it"? Suppose the right to light were acquired by contract instead of by prescription, then a breach of the contract would bring in the rule in *Hadley* v. *Baxendale* (5), where it was laid down that the damages recoverable are such as may fairly and reasonably be considered as arising naturally from the breach, or such as may reasonably be supposed to have

(1) (1884) 9 P. D. 105.
(2) (1889) 14 App. Cas. 519.
(3) [1893] 1 Q. B. 459, 464.
(4) (1889) 24 Q. B. D. 326.
(5) (1854) 9 Ex. 341.

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been in the contemplation of the parties, at the time of the contract, as the probable result of the breach of it.

[COZENS-HARDY M.R. referred to the judgment of Buckley L.J. in *Horton* v. *Colwyn Bay and Colwyn Urban Council* (1), where he said: "The legal proposition involved in the *Tilbury Case* (2), I think, is that if an actionable wrong has been done to the claimant he is entitled to recover all the damage resulting from that wrong, and none the less because he would have had no right of action for some part of the damage if the wrong had not also created a damage which was actionable."]

Yes, that is admitted, but the question is whether the damage is or is not too remote. We do not contend that the damages are to be confined to the injury caused to any particular window, but the question is how far it is to go. The general principle is laid down by Lord Esher in the *Tilbury Case*. (2) It is unreasonable to attribute to a building owner that he ought to consider anything beyond the probable injury to the existing windows. This is easement. The burden on a servient tenement cannot be increased or varied from time to time at the will of the owner of the dominant tenement: *Martin* v. *Goble* (3); *Colls* v. *Home and Colonial Stores*. (4)

The sole question is on which side of the line does this case come. Is the damage too remote or not? Lord Esher in the *Tilbury Case* (5) no doubt said: "Where a plaintiff has a cause of action for a wrongful act of the defendant the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act." But that was only a dictum, because that case turned on the construction of ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845.

In *Moore* v. *Hall* (6) the decision was that in estimating the damages it must be considered whether there had been a sensible diminution of light so as to make the plaintiff's premises less available for the purposes of occupation or business to which they

(1) [1908] 1 K. B. 327, 341.
(2) 24 Q. B. D. 326.
(3) (1808) 1 Camp. 320.
(4) [1904] A. C. 179, 202.
(5) 24 Q. B. D. 329.
(6) (1878) 3 Q. B. D. 178.

were then or might thereafter be made applicable. But that does not seem to contemplate new premises and a new building.

[COZENS-HARDY M.R. referred to *Ecclesiastical Commissioners for England* v. *Kino*. (1)]

Neville J. ought only to have considered the position of the plaintiff as owner of the dominant tenement, i.e., Nos. 62 and 63. The plaintiff's right is attached to a particular building, and the wrong suffered is a wrong done in respect of that particular building. The damages must be restricted to that.

Peterson, K.C., and *J. M. Gover*, for the respondent, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J., who has awarded a certain sum by way of damages in respect of an admitted legal nuisance. I say "admitted" because it was admitted in the most formal manner on the pleadings that by the new building of the defendants, which is shewn on the model which is before us, there had been such an interference with the comfortable use and enjoyment of certain ancient lights in a house belonging to the plaintiff as amounted to a legal actionable nuisance within the meaning of *Colls' Case*. (2)

We have heard a long and elaborate argument as to the principle upon which damages should be awarded in a case like this. First of all, let me endeavour to picture to myself what it is we are dealing with. The plaintiff is the owner of a block of land nearly but not quite square: forty-three feet facing Brunswick Street and forty-eight feet six inches at right angles to Brunswick Street; the whole block judging from my eye is rather smaller than the Court in which we are sitting. Upon this site there are two houses facing Brunswick Street which admittedly have ancient lights which are interfered with. No. 63 is an extremely small tenement judging by the scale on the map which is before me. Its frontage to the street is certainly under thirty feet. I should think it is about twenty feet. Its depth going back may be about twenty-five feet, but not more than that. It is a one-storey building so far as I can gather from the model. No. 62 is even narrower towards the front. It is not even fifteen

(1) (1880) 14 Ch. D. 213. (2) [1904] A. C. 179, 202.

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feet towards the street. It goes back a little further and it may be it amounts to about thirty feet in depth. These houses are obviously very small. As a matter of fact they are old. The learned judge says if they were not demolished by the owner of the property himself they would probably be compulsorily demolished by virtue of some order made by the local authorities in London. At the rear of this small block there is another building which is approached from Brunswick Street by a passage alongside No. 63, and on that there is a warehouse, which again must be very small indeed. The dimensions do not appear; but inasmuch as the whole length can only be forty-three feet and the depth about fifteen feet, that would leave no margin, I think, anywhere for building. Now the houses upon this property must inevitably be soon taken down and in some way the property utilized as a building site by any prudent owner. That is apparent to anybody who sees it. It is also apparent that it is a neighbourhood which is now being covered more or less by large buildings in the nature of factories or warehouses; and the point we have to consider is this: there being admittedly ancient lights in Nos. 62 and 63 facing Brunswick Street, and there being admittedly an actionable wrong by the defendants in interfering with those ancient lights, what is the measure of damages, or what are we entitled to take into consideration in assessing damages, for this wrong?

I wish to approach this question in at least two ways. In the first place, suppose the plaintiff had not, by reason of delay in commencing proceedings, failed to obtain an injunction, he certainly could have obtained one; and if he had done so, it is clear that that injunction, by virtue of these ancient lights, would have prevented the defendants from building any part of that which is opposite to the plaintiff's houses above what is called the line shewn on the model. That would have enured for the benefit of the whole site, and it would have been competent without doubt for the plaintiff to have utilized this site in the only way in which a sensible man of business would use it, namely, by treating it as a whole. For to suggest that anybody would rebuild these two buildings on their old site is really absurd and impossible. Well, it is said that that may be so as to an injunction; it may be that

in that indirect way the plaintiff could have got protection for the whole of this building site; but further it is said that that has nothing whatever to do with a case in which no injunction is asked for. It was asked for in the writ and statement of claim, but no injunction was asked for at the hearing, and it is said that the considerations to which I have alluded have no application to a case where merely damages are asked for. Well, I ask myself, why not? A wrongful act has been committed by the defendants: what damage has the plaintiff suffered? It has been strenuously argued that if there be a house with, say, a small garden on one side or the other, the only thing you can do is to see what damage has accrued or arisen to the plaintiff with reference only to the bricks and mortar of the actual building round which that garden lies. It has been said that you must disregard altogether the fact that it is a house with a garden alongside it or an open space at the back; that you have nothing whatever to do but to consider what is the value of the particular rays of light which are prevented from coming to the ancient windows, and that is all you have to consider. I am very slow indeed to accept that view. It seems to me there is absolutely nothing in *Colls' Case* (1) which has any bearing on this. *Colls' Case* (1) only dealt with the question of nuisance or no nuisance. There may be many cases in which there is an interference with an ancient light, but in considering whether the interference is of such a nature as to amount to a legal nuisance certain very important and very valuable rules are laid down in *Colls' Case*. (1) But given the existence of the nuisance, as we have it here, I fail to see that *Colls' Case* (1) has any bearing whatever upon the measure of damages. It cannot be that in assessing damages the only thing to be considered is the right in respect of the precise building which is before the Court. Under the Prescription Act you have to consider the quantity of obstruction in order to ascertain whether there is a nuisance. The nuisance has been established here, and I really fail to see why, in a case like this, the plaintiff cannot say "I am owner of this small block of forty-eight by forty-three feet, which obviously must be used as one building site, and in considering the amount of damages to which I am entitled regard

(1) [1904] A. C. 179, 202

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must be had to the fact that it is a building site, and that the value of Nos. 62 and 63 is not to be considered solely as though my property ended with the back wall of those houses, but must fairly be considered on this footing, that they are part of a small block the residue of which belongs to me, and which any reasonable and prudent man would deal with on that footing."

There is an authority on this point. It seems to me that the judgment of Lord Esher in the *Tilbury Case* (1) is directly and expressly in point. That was a case where a railway company had erected certain buildings which interfered with the ancient lights of a building on the opposite side of the road. This building had, as most of these buildings have, some lights which were not ancient, and the question was whether the railway company was bound to pay compensation in respect of the whole of the windows so obstructed, including the windows and portions of the windows which did not coincide with any of the ancient lights. There were two grounds on which the case was put. One was under s. 16 of the Railways Clauses Act, which of course does not apply here. But Lord Esher says (2): "Supposing the company had been in the ordinary position of owners of land and not affected by any statute and had then done what they have done, the trustees would have been entitled to sue them in a common law action for interference with ancient lights, could the plaintiffs in such an action have recovered damages in respect of injury to all the lights affected, the new as well as the old? On this point the rule seems to me to be that where a plaintiff has a cause of action for a wrongful act of the defendant the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act. If that be so, and a person puts up buildings, the inevitable consequence of their erection being to obstruct ancient and modern lights, should he not be taken to have foreseen that in obstructing the one he would obstruct the other? If that were proved in a common law action the plaintiff would be entitled to damages for the whole of the consequences

(1) 24 Q. B. D. 326. (2) 24 Q. B. D. 329.

of the wrongful act of obstructing ancient lights, which would include damage to the new as much as to the old lights." If that be good law, it seems to me to carry the case the whole way. The matter came before this Court in a subsequent case of *Horton* v. *Colwyn Bay and Colwyn Urban Council* (1), in which Buckley L.J. and Kennedy L.J. were both parties to the decision, but in which Buckley L.J. especially referred to the decision in the *Tilbury Case* (2) and gave an explanation of it, as it seems to me, approving and adopting what Lord Esher has said; and it is impossible to regard that as a mere dictum. It was one of the two grounds for his decision. It is no doubt true that the decision might have been supported on other grounds—on the ground of s. 16 of the Railways Clauses Act, as Lord Esher himself said; but that does not in any way detract from the value of that opinion of a very learned judge, particularly on this branch of law.

I therefore think that this is a case in which we are at liberty to consider not merely what damage has been done in respect to these ancient lights in these ancient buildings, but also to consider what is the damage which the plaintiff has suffered by reason of the wrongful act of the defendants in creating a nuisance by interfering with the ancient lights. From that point of view I think the learned judge was quite right in the view which he took. He does not in the least say that the plaintiff had any ancient lights in No. 63A in respect of which he was entitled to claim. But that is not at all the way to look at it. He says that the interference with the plaintiff's admitted ancient lights involves the consideration that the owner of this block would be entitled to use and would naturally and reasonably use those two houses in conjunction with the other part of his property and regard must be had to that fact in assessing damages. That being so, it seems to me that the learned judge's decision was quite right, and that this appeal must be dismissed with costs.

BUCKLEY L.J. This is a pretty question, and in the exact form in which it here presents itself it is I think new, but at the same time I do not think there is much difficulty in its solution

(1) [1908] 1 K. B. 327. (2) 24 Q. B. D. 326.

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on principle, although it may not be covered by authority. I start with the proposition upon which the appellants insist, and which has my entire concurrence. Sect. 3 of the Prescription Act uses the word "therewith." It speaks of the access and use of light to and for a building actually enjoyed therewith for twenty years, and says that the right thereto shall be deemed absolute. There is no question I think but that an easement of light is a right enjoyed with a building and attributable to, founded upon, attached to—I do not know exactly what the right verb is—a building. It cannot be enjoyed except in connection with a building. It must be enjoyed with a building, and it is a thing which is preserved with the building so long as the substantial identity of the building and the substantial identity of the aperture through which the light is enjoyed remain undisturbed. But having started with that proposition, the next step is this: the plaintiff here was entitled to two little houses, Nos. 62 and 63, Brunswick Street, with windows looking upon the street. I agree that the right of light which he enjoyed was a right enjoyed with Nos. 62 and 63. He also owned a warehouse at the back of those houses, No. 63A. That was a building to which there was no access of light, so far as I am concerned with it here, over the defendants' premises. The question to be answered is: inasmuch as a legal nuisance has been created by the defendants in raising their building so as to obstruct the access of light to Nos. 62 and 63, what is the proper measure of the damages to which the plaintiff is entitled? Is it limited to his ownership of 62 and 63, or does it extend to his ownership of 63A?

Let me first give an illustration for the purpose of explaining what I conceive the right to light to be. Suppose a man has for more than the statutory period of prescription enjoyed the right of light to a house which has a dining-room. Suppose that for more than the statutory period that room was twenty feet deep, but that some two or three years ago he increased its depth by putting the wall back, so that the dining-room from front to back became increased to twenty-five feet. So far as this additional five feet is concerned, there is no prescription of light. The building with the additional five feet has not enjoyed light for the prescriptive time. But the enjoyment of the light to

the twenty feet enured to his benefit in that when he threw in the additional five feet he enjoyed a greater advantage. If that person sued, to what damages would he be entitled on its being found that there was a nuisance? Would he be entitled to damages on the footing that a house with a dining-room twenty feet deep had been injured or on the footing that a house with a dining-room twenty-five feet deep had been injured? I think the latter. He is entitled to such damages as result from the injurious act, the tort which the defendant has done him, and the damage he has sustained is the damage to his house as it is, that is with a dining-room twenty-five feet deep. Let me put another illustration which was suggested in the course of the argument. Suppose a man had a warehouse bounded by a large and high blank wall on the road having in it only one window, say for the purpose of lighting a counting-house on the ground floor. The owner of that building might open any number of windows—modern windows—in his blank wall, but in respect of these he would not be entitled to sue. Suppose the man on the opposite side of the road raised his building, and it was found that there was a legal nuisance to the one small ancient window. The owner would be entitled, under proper circumstances, to an injunction. If he obtained an injunction his injunction would operate to protect not only the one ancient window in the counting-house, but also in fact although not as of right any modern windows which might have been opened in the wall. Suppose he failed to get an injunction, but got damages, what damages would he be entitled to? He would be entitled to damages measured by the depreciation of the building, not with the one little window on the ground floor only, but with all the other windows. That would be the extent to which he had been injured, and it seems to me as matter of principle that that would be the proper measure of damages.

The argument on the other side not ostensibly but in fact assumes that the action is brought for the pecuniary value of the access of light to each particular room through each particular window. On that footing it would be necessary to sue in respect of each room in the house. No room enjoys the same light exactly as another room: the action is not in respect of that, but

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in respect of the injury to the house as a whole. The thing to be ascertained is the injury to the house as a whole by reason of the infringement of the right to light to certain of its windows. What is the house as a whole? The house as a whole does not mean merely those rooms which look to the front. It includes rooms which look to the back. These do not get any light from the front, of course; but the house such as it is being, by reason of the deprivation of the light to the front, damaged as a house having both a front and a back, the whole property is to be taken into consideration in determining what is the amount of the damage sustained.

Here the material facts are these: These two houses are small old dilapidated buildings. The plaintiff's property is valuable not on account of these two little houses only but also on account of the land at the back. The future of the property is that it will eventually become the site of a building which may cover more surface than the present building. The damage sustained is measured by the difference between the value of the plaintiff's property if the injury is not done and its value if the injury is done.

So far as regards principle. But further, it seems to me that the *Tilbury Case* (1) goes a very long way to decide this one. I agree with what has been said, that the point relevant to this case is to be found only in the judgment of Lord Esher. There were two points in the case: the one whether at common law the damages would extend to the modern windows as well as the old, and the other whether, having regard to s. 16 of the Railways Clauses Act, it would extend to both the one and the other. I think the other two judges who gave judgment founded themselves only on the second point and not on the first. Lord Esher certainly founded his judgment on the first. It seems to me that the effect of the *Tilbury Case* (1) is this: that if the plaintiff, as is the case here, has an actionable wrong in respect of Nos. 62 and 63, and is injured, but has no right of action in respect of the injury as regards No. 63A, then if he is in a position to sue, as he is in respect of 62 and 63, he may at the same time say "The injury done to me is not confined to those two houses; I

(1) 24 Q. B. D. 326.

am injured also as regards 63A." Lord Esher's decision in the *Tilbury Case* (1) looked at in that way governs this case. Here the plaintiff is injured not only in respect of the houses in front, but in respect of the whole property. He could not have sued in respect of 63A alone, but being in a position to sue in respect of 62 and 63 he can recover the whole damage, including that in respect of 63A. For these reasons I think the appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. The important passage of Neville J.'s judgment appears at the bottom of p. 295 and the top of p. 296 of the report [1912] 1 Ch., and the words of the learned judge are these: "It seems to me I am entitled to take into consideration the plaintiff's position and to have regard, in considering the diminution in value of the premises lighted by these windows, to the fact that he is the owner of property which would enable a purchaser from him to acquire a site available for the purpose of erecting buildings of the character which are suitable for the neighbourhood."

It is not necessary again to describe the nature of the premises, but it is said that the judgment of Neville J. is wrong having regard to the passage which I have quoted, and if I may summarize the arguments which have been addressed to the Court by the appellants' counsel, Mr. Jenkins says that the damages which have been given by the learned judge are not sufficiently proximate but are too remote. But Mr. Vernon, as I understand him, rather put it that the judge has gone wrong, because he has in assessing the damages taken into consideration a loss which is described as damnum absque injuria—in other words, a loss that is not referable as between these litigants to an actionable wrong on the part of the defendants. I confess I am unable to adopt either of these two contentions. The case is one of novelty. But at the same time I do not feel any difficulty in coming to the same conclusion as the learned judge has done. In giving 200*l.* damages, he has considered the diminution in value of the premises lighted by these windows. Now, unless the proposition (which nobody has argued) is admitted, that you are

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to look only at the premises as they exist so as to assess the damages in respect of the rooms having ancient lights, what you must consider is the damage to the owner in respect of the injury to the light to the whole of the premises in question. The diminution, if it be an actionable wrong at all, is diminution by the loss of light to the whole premises. I cannot accept the argument that, in assessing the diminution in value of the premises by reason of the wrong, you ought to limit the damages to that part of the premises which fronts on the street and pay no regard to the premises adjoining, if the evidence is such as to shew that the natural utilization of the premises is to treat them as a whole. It cannot be well contended that in these circumstances the plaintiff, who is seeking a remedy either by injunction or damages, is limited to a claim in respect of the dilapidated and antiquated building which at present exists; and directly you have quitted what I may call the dress and circumstance of the building as it exists, why should we exclude the consideration of the user which any sensible man would make of these premises, and not consider how far that user of the premises has been diminished by reason of the admittedly wrongful act caused by the obstruction of light? I do not see how that can be said to be too remote or not sufficiently proximate. Suppose that I am the owner of a house in a state of dilapidation and having ancient lights. How can it be too remote to consider whether I can avail myself of the advantage of those lights which my dominant tenement possesses or to consider that in rebuilding, of course, I might build upon my garden as well as upon the site of the house as it stands? I cannot see how that can reasonably be maintained from any point of view, nor can I see, on the other hand, that it can be said to be damnum absque injuria. The loss which has been inflicted on me (and which now as a matter of law must be assumed to be proved), on my rebuilding on a sensible scale and in a sensible way, is a loss which I should not have suffered but for the wrongful act. As Lord Esher puts it in the case referred to, it is true that the wrongful act is actionable in so far only as it has affected my ancient lights. But directly the wrong has been inflicted it produces, as a natural and necessary consequence, the deprivation of the advantage which

the protection of the ancient lights gave to the owner of the property to which those lights belong.

For these reasons I am of opinion that the learned judge could not rightly refuse to take into consideration that which he has taken into consideration, namely, the diminution in value caused by the wrongful act of the defendants to the whole of these premises if they are developed in the way which reason dictates.

Solicitors: *Munton, Morris & King; Church, Adams & Prior, for Marshall & Liddle, Croydon.*

G. A. S.

VIOLA *v.* ANGLO-AMERICAN COLD STORAGE COMPANY.

[1912 A. 419.]

Practice—Company—Receiver—Debenture-holder's Action—Proceedings to be carried on by Receiver—Costs out of Assets—Proceedings against a Mortgagee who has a Charge upon the whole of the Assets—Discretion of Court.

The question of what proceedings a receiver appointed in a debenture-holder's action is to be allowed to take or continue at the cost of the company's assets is one wholly for the discretion of the Court. The fact that a debenture-holder has a charge upon all the assets of the company does not give him a right to prevent the receiver being allowed to carry on proceedings commenced by the company against him in another capacity at the cost of the assets over which he has a charge.

In August, 1911, an action was commenced by Tzokow, the holder of a debenture issued by the Anglo-American Cold Storage Company, and the company against the executors of Hickman, a first mortgagee of some of the property comprised in the debenture, to set aside a sale by the executors, purporting to be made under a power contained in Hickman's mortgage, on the grounds that it was not bona fide, was at a gross undervalue, and fraudulent. The purchasers, Messrs. Vestey, were also defendants. In the course of the action Tzokow transferred the debenture to Viola, who was a bare trustee for him, and Viola's name was substituted as plaintiff in the action. Afterwards Viola was

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struck out as plaintiff and added as defendant, leaving the company sole plaintiffs. Subsequently Messrs. Vestey bought up Tzokow's interest in his debenture and commenced an ordinary debenture-holder's action in the name of Viola against the company and their second mortgagees and obtained the appointment of a receiver and an order that the company should give security for costs to the amount of 500*l*. By an order made in the debenture-holder's action in chambers on April 29, 1912, leave was given that the Anglo-American Cold Storage Company, acting by the receiver, should continue and carry on the action of the company against Hickman; and it was ordered that the receiver should be allowed the costs thereof as part of his proper charges as receiver in the debenture-holder's action.

It was also provided that the company should pay into Court 250*l*., half the amount ordered to be given as security for costs, and the second mortgagees, who were defendants, consenting to pay the residue, should do so. In drawing up the order the words "acting by the receiver" were accidentally omitted.

This was a motion by the plaintiff in the debenture-holder's action to discharge the order made in chambers. The form of the order and the circumstances under which it was made are more fully stated in the judgment.

Hon. Frank Russell, K.C., and *A. à Becket Terrell*, for the motion. The debenture held by the plaintiff covers all the property of the company and it is held by him as a bare trustee for Messrs. Vestey, who were the purchasers at the sale by Sir A. Hickman's executors, which the company is trying to set aside in the action of the company against Hickman. The effect of the order giving the receiver leave to carry on that action and giving him his costs is to let the receiver use the property of Messrs. Vestey to carry on an action against them. The Court has no jurisdiction to make such an order in a debenture-holder's action the object of which is merely to protect and realize the assets of the company.

Austen-Cartmell, for the second mortgagees. The fallacy of the argument on the other side lies in treating the assets of the company as if they were the property of Messrs. Vestey. They only hold a debenture, the amount due to them is not

ascertained, and there is nothing to shew that the assets are not sufficient to pay them off. It is only the existence of the receiver which prevents the company from using their assets to carry on the action without any order at all. The Court has complete seisin of the matter just as it has of a trust estate being administered in Court. When the Court directs litigation on behalf of a trust estate, persons interested are sometimes allowed to be free from the burden of costs if they will forgo all share in the profits of litigation. But Messrs. Vestey decline to do this. Their object is to destroy the company because they are trade rivals. Under the circumstances the order is right.

H. B. Vaisey, for the company.

Hon. Frank Russell, K.C., in reply.

Cur. adv. vult.

May 24. SWINFEN EADY J. This is a motion on behalf of the nominal plaintiff in a debenture action to discharge an order made by me in chambers on April 29. The order is as follows: "It appearing that Otto Franc Viola the plaintiff in this action has been struck out as plaintiff and added as a defendant in the said action *Anglo-American Cold Storage Company Limited* v. *Hickman* and that the last named company have been ordered to give security for costs in such action in the sum of 500*l*. It is ordered that the receiver appointed in this action or the defendants the Anglo-American Cold Storage Company Limited do lodge in Court as directed in the schedule hereto 250*l*. And the defendants Bourke Schiff & Co. by their counsel undertaking to lodge in Court a further sum of 250*l*. It is ordered that the defendants Bourke Schiff & Co. be at liberty to lodge such sum of 250*l*. in Court as directed by the said schedule. And the defendants the Anglo-American Cold Storage Company Limited" —then the words "acting by the receiver" ought to be in the order, but they have been inadvertently omitted—"are to be at liberty to continue and carry on the said action of *Anglo-American Cold Storage Company Limited* v. *Hickman* [1911 T. 1054]. And it is ordered that the said receiver in prosecuting the said action be allowed the costs thereof as his proper charges as receiver in this action."

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The circumstances under which that order was made are as follows: The Anglo-American Cold Storage Company, Limited, was incorporated on August 27, 1909, with a share capital of 175,000*l.*, the whole of which has been issued, to take over a cold storage business, then carried on at certain leasehold premises under the name of the Anglo-American Cold Storage Company, and of acquiring and equipping with cold storage plant and machinery certain freehold premises known as Greenbank Warehouse, Tooley Street, in the city of London, together with a freehold plot of land and leasehold hereditaments with plant and machinery known as the Stoney Lane Warehouse, Stoney Lane, Tooley Street, S.E. The business and property were purchased in December, 1909, by the plaintiff company for 142,000*l.*, subject to a specific mortgage dated December 24, 1907, for 20,000*l.*, and a floating charge dated December 6, 1909, for that amount, and a further 5000*l.*, making together 25,000*l.*, in favour of Sir Alfred Hickman. He died on March 11, 1910. On June 2, 1911, the company issued a debenture to one Dimitri Tzokow to secure 10,000*l.*, expressed to rank as a second charge except as regards uncalled capital, as to which it was a first charge. It is alleged that on July 27, 1911, Sir Alfred Hickman's executors, without giving any notice either to the company or Tzokow, wrongfully and improperly by private contract agreed to sell the mortgaged property for 31,700*l.* to William Vestey and Edmund Hoyle Vestey, who are directors and nominees of the Union Cold Storage Company, Limited, rivals in trade of the Anglo-American Company. It is claimed that the sale was, to the knowledge of the vendors, at a grossly inadequate price, and was not a bona fide sale, and that at the time the mortgagees entered into the contract for sale the power of sale was not exercisable. It is alleged that the property was worth 93,376*l.* at the least. Tzokow and the company thereupon commenced an action against Sir Alfred Hickman's executors and Messrs. Vestey, the purchasers, to set aside the sale on the grounds which I have mentioned. The writ was issued on July 29, 1911. Tzokow subsequently transferred his security to Otto Franc Viola (who nevertheless held in trust for Tzokow), and Viola was substituted for Tzokow as co-plaintiff in the action with the Anglo-American Company.

The pleadings in the action were closed on November 25, 1911. Apparently in order to prevent this action being tried, the Vesteys conceived the idea of buying up Tzokow's second mortgage and debenture, which remained registered in Viola's name, and then instituting a debenture action and obtaining the appointment of a receiver of the whole of the company's assets, so as if possible to deprive the company of the means of further prosecuting the action. Accordingly, in consideration of 8250*l.* expressed to be paid to Viola as trustee for Tzokow, Messrs. Vestey obtained on March 20, 1912, an assignment of the debenture of June 2, 1911, for 10,000*l.*, and of all Viola's rights and remedies thereunder. They did not register this assignment with the plaintiff company, but on the very same day upon which the assignment was taken, March 20, 1912, they issued a writ in Viola's name, making Viola the sole plaintiff and the company and Bourke, Schiff & Co., subsequent mortgagees, defendants, asking for the usual relief in a debenture action. By an order of Neville J. made on April 3 it was ordered that a proper person be appointed receiver and manager of all the property and assets of the company, and the order contained a direction that the receiver was not to disclose to the plaintiff Viola or to the Messrs. Vestey personally any of the papers in the action of *Viola* v. *Hickman*, or any of the trade books or papers of the company, until after the trial of that action.

Having thus succeeded in placing in medio the whole of the assets and property of the company, the next step of Messrs. Vestey was to ask that the company should give security for the costs of the action, and by an order of Parker J. the company has been ordered to give security to the extent of 500*l.* The order now complained of provides for this security being given, as to 250*l.* out of the assets of the company in the possession of the receiver, and the receiver has funds in hand more than sufficient for that purpose; Messrs. Bourke, Schiff & Co. undertake to provide a further 250*l.*, making 500*l.* in all.

Messrs. Vestey now contend that they are entitled as second mortgagees to prohibit any portion of the company's assets being applied in supporting the action against themselves as purchasers under the impeached contract. They frankly conceded

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in argument their object in buying up the second charge, and claimed to exercise what they urged was their legal right to use that mortgage in order to prevent the continuance of the action against themselves. But as second mortgagees they do not submit to be charged in account with what might be recovered by prosecuting the action. They object to the action as it is against themselves in another capacity, and they claim to prohibit the action being further prosecuted out of the company's funds. As, however, upon their application a receiver and manager has been appointed by the Court, they are not in my opinion entitled to dictate whether the proceedings shall be continued or not. Their objection is not based upon any evidence, or indeed any argument, that the action is not likely to succeed, or that in the interest of the various parties it would be better for it not to be proceeded with. The greater the probability of success, and therefore the greater the danger in which they stand as purchasers, the more strenuously they insist upon the assets of the company not being employed in continuing the action.

In my opinion Messrs. Vestey have no right as mortgagees to say that the assets of the company shall not be applied in getting in a valuable asset of the company, or what for the purposes of this motion must be assumed to be a valuable asset. If they were mortgagees in possession and did not collect and get in a valuable asset which they might have done, whereby it was lost, they would be liable to be charged in account with its value on the footing of wilful default. If the contention of Vesteys were correct, a mortgagee of a business could, after obtaining the appointment of a receiver and manager of the business, prevent that business being carried on and indeed effectually destroy it. He could say that as soon as any money was received in the business no part of it should be expended in buying fresh goods to carry on the business, and that notwithstanding the fact that he was interested in a rival business which he was anxious to benefit.

It is, however, well settled that in a mortgagee's action where a receiver and manager has been appointed it is for the Court to determine whether proceedings shall be taken at the expense of the mortgaged property. The receiver cannot do this of his own

initiative, but would run the risk of his costs being disallowed if he did not obtain the direction of the Court (see *Bristowe* v. *Needham* (1) and *Wynn* v. *Lord Newborough* (2)), and neither mortgagor nor mortgagee has any absolute right to insist upon an action being brought or to prohibit it being brought by the receiver at the expense of the mortgaged property. The appointment of a receiver is a matter of discretion to be governed by the whole of the circumstances of the case : see Lord Truro's judgment in *Owen* v. *Homan*. (3) It is made in the first place for the protection of the estate and for the benefit of all concerned, and in sanctioning the receiver taking proceedings the Court has regard to what it considers right and proper in the interest of all parties.

During the argument of the present case Messrs. Vestey's counsel insisted upon their right, as second mortgagees and debenture-holders, to profit by the action if successful against themselves as purchasers, and declined to concur in any suggestion that the action should be continued at the risk and for the benefit of the other parties interested. They contended that as second mortgagees under Viola's debenture they would be entitled, if the action succeeded, to the payment of their full 10,000*l.*, interest, and costs, before there could be any surplus for subsequent mortgagees or for the company; and yet they insisted that the action could only be continued at the risk and costs of the subsequent mortgagees.

Under these circumstances I am of opinion that the order made in chambers was right, and that this motion to discharge it must be refused with costs.

Solicitors : *Ayrton, Radcliffe & Wright ; Freeman & Cooke.*

(1) (1847) 2 Ph. 190. (2) (1790) 3 Bro. C. C. 88.
(3) (1851) 3 Mac. & G. 378, 412.

J. R. B

C. A.
1912
June 13.

In re WAREHAM.

WAREHAM *v.* BREWIN.

[1911 W. 1504.]

Will—Construction—Residuary Gift—Tenant for Life—"Rents, issues and profits"—Leaseholds—Enjoyment in Specie—Conversion.

A testator gave the residue of his real and personal estate to trustees upon trust to permit his wife to receive the rents, issues and profits from his said real and personal estate during her life, and after her decease he gave the residue of his said real and personal estate, whatsoever the same might then consist of and wherever the same might be, to two persons equally to be divided between them. The residuary estate included both freehold and leasehold property:—

Held, following *In re Game* [1897] 1 Ch. 881, that the rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137a, must be applied, and that the widow was not entitled to the whole of the rents and profits of the leaseholds, but was only entitled annually to a sum equal to the dividends which would be produced if the leaseholds had been sold a year after the testator's death and invested in Consols.

Decision of Neville J. affirmed.

Harris v. *Poyner* (1852) 1 Drew. 174; *Craig* v. *Wheeler* (1860) 29 L. J. (Ch.) 374; and *In re Game* approved.

Crowe v. *Crisford* (1853) 17 Beav. 507; *Wearing* v. *Wearing* (1856) 23 Beav. 99; *Vachell* v. *Roberts* (1863) 32 Beav. 140; and *In re Elmore's Will* (1860) 9 W. R. 66, overruled.

Appeal from a decision of Neville J.

The testator Edward Vincent Wareham by his will, dated June 21, 1905, after appointing his wife and the defendant the Reverend William de Bruen Brewin to be executors and trustees thereof and bequeathing to his said wife certain personal effects, furniture, and other things in and about the premises in which he resided and a legacy of 50*l.*, gave, devised, and bequeathed all the residue of his real and personal estate to his trustees upon trust to permit his said wife to receive the rents, issues and profits from his said real and personal estate for her own exclusive use and benefit for and during the term of her natural life, and after her decease he gave certain annuities and subject thereto he bequeathed the residue of his said real and personal estate whatsoever the same might then consist of and wherever the same might be unto the said defendant and Annie his wife

equally to be divided between them and the whole to the survivor of them should either predecease the testator or his said wife, whichever of them should be the longer liver, and he declared that all the moneys requiring investment at any time under the trusts of his will should be invested as therein mentioned.

The testator died on October 23, 1905, and his will was proved by the executors.

The estate of the testator consisted almost entirely of real and leasehold property, and shortly after his death his widow entered into the receipt of the rents and profits thereof. At the date of his will the testator's leaseholds were held for various terms, the shortest of which had then sixteen years to run.

In 1911 the question was raised by the defendant whether the widow was entitled to receive the rents of the testator's leasehold properties in specie or whether a certain part of them ought to be applied as capital.

On June 2, 1911, an originating summons was taken out by the widow as plaintiff asking inter alia that it might be determined whether upon the true construction of the will any and what part of the rents and profits of the leaseholds forming part of the residuary estate ought to have been and ought in future until conversion to be set aside as capital, and whether any and what part of such rents and profits ought to have been and ought to be applied as income.

Upon the hearing of the summons Neville J. thought that he ought to follow *In re Game* (1), and accordingly decided that the plaintiff was not entitled to the whole of the rents and profits of the leasehold property forming part of the testator's residuary estate, but was only entitled annually to a sum equal to the dividends which would be produced if the said leasehold property had been sold at the expiration of one year from the testator's death and invested in Consols.

Against this decision the plaintiff appealed.

W. H. Cozens-Hardy, for the appellant. There are sufficient indications in this will to shew an intention on the part of the testator that the rule in *Howe* v. *Earl of Dartmouth* (2) should

(1) [1897] 1 Ch. 881. (2) 7 Ves. 137a.

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not apply. First I rely upon the gift of "rents, issues and profits" as shewing that the property is to be enjoyed in specie, and secondly upon the form of the ultimate gift in remainder, which is a gift of the residue of the testator's "said real and personal estate whatsoever the same may then consist of" as negativing conversion. This case may be distinguished from *In re Game.* (1) At any rate that case is inconsistent with the earlier authorities.

The rule in *Howe* v. *Earl of Dartmouth* (2) is an artificial rule and slight indications of intention will exclude its application. This is shewn by a series of cases, the first of which is *Pickering* v. *Pickering.* (3)

[FARWELL L.J. That was treated as a case in which there was no real estate.]

In *Hunt* v. *Scott* (4) there was both realty and personalty at the date of the will. *Burton* v. *Mount* (5), *Blann* v. *Bell* (6), *Harris* v. *Poyner* (7), *Crowe* v. *Crisford* (8), and *Hood* v. *Clapham* (9) are all cases of the same class. *Wearing* v. *Wearing* (10) is indistinguishable from the present case. See also *In re Elmore's Will* (11), *Vachell* v. *Roberts* (12), and *Stanier* v. *Hodgkinson.* (13) In all these cases there are indicia which have been regarded as sufficient to exclude the operation of the artificial rule in *Howe* v. *Earl of Dartmouth* (2), and those indicia are present in this will. The only cases to the contrary are *In re Game* (1) and *Craig* v. *Wheeler* (14), which was followed by Stirling J. in the former case. Neville J. was in favour of the older authorities, but felt himself bound by the decision in *In re Game.* (1)

F. H. Maugham, for the respondent, was not called upon.

COZENS-HARDY M.R. This case raises the question whether the rule in *Howe* v. *Earl of Dartmouth* (2) applies in the present case

(1) [1897] 1 Ch. 881.
(2) 7 Ves. 137a.
(3) (1839) 4 My. & Cr. 289.
(4) (1847) 1 De G. & Sm. 219.
(5) (1848) 2 De G. & Sm. 383.
(6) (1852) 2 D. M. & G. 775.
(7) 1 Drew. 174.
(8) 17 Beav. 507.
(9) (1854) 19 Beav. 90.
(10) 23 Beav. 99.
(11) 9 W. R. 66.
(12) 32 Beav. 140.
(13) (1903) 73 L. J. (Ch.) 179.
(14) 29 L. J. (Ch.) 374.

so that the widow is not entitled to the enjoyment of the rents and profits of the testator's leasehold property in specie. There have been during and since the last century, and probably before then also, a great number of authorities dealing with the application of this rule. I think it has been settled by authorities which bind us, in particular by *Blann* v. *Bell* (1), a decision of this Court, and *Macdonald* v. *Irvine* (2), that the rule in *Howe* v. *Earl of Dartmouth* (3) must be applied, unless it appears on the construction of the particular will that the testator has shewn an intention that the rule shall not apply. The burden of proving this rests on the tenant for life who claims to enjoy the property in specie. There has been a series of cases in which, under certain circumstances, it has been held that the testator had shewn the contrary intention, but, with the exception of certain cases reported in Beavan's Reports and *In re Elmore's Will* (4), there is not a single case which supports the appellant's contention. No doubt there were *Wearing* v. *Wearing* (5), where no reasons were given for the decision, and *Crowe* v. *Crisford* (6), which did not turn on this point alone, and *Vachell* v. *Roberts* (7), which do to some extent support counsel's argument, but to my mind it is impossible to reconcile those cases with the decision of the Court of Appeal in *Blann* v. *Bell* (1) and the two judgments of Kindersley V.-C. in *Harris* v. *Poyner* (8) and *Craig* v. *Wheeler*. (9) I desire to adopt entirely the language of Kindersley V.-C. in *Craig* v. *Wheeler* (9), and the clear, admirable, and conclusive judgment of Stirling J. in *In re Game*. (10) Stirling J. had his attention drawn to a great number of authorities, and he says that he had looked into them and also into some others. He sums up his conclusion in these words (11): "I agree with Kindersley V.-C., that where a testator has both freeholds and leaseholds, the mere use of the word 'rents' is not an indication of intention that the property is to be enjoyed in specie, inasmuch

(1) 2 D. M. & G. 775.
(2) (1878) 8 Ch. D. 101.
(3) 7 Ves. 137a.
(4) 9 W. R. 66.
(5) 23 Beav. 99.
(6) 17 Beav. 507.
(7) 32 Beav. 140.
(8) 1 Drew. 174.
(9) 29 L. J. (Ch.) 374.
(10) [1897] 1 Ch. 881.
(11) [1897] 1 Ch. 887.

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WAREHAM, *In re.* WAREHAM v. BREWIN.

Cozens-Hardy M.R.

as the use of that word can be satisfied by applying it to the freeholds."

That being my view of the law now applicable to these cases, I have to apply it to this particular will and to see whether it contains sufficient to negative the application of the rule. [His Lordship then read the gift of the life interest in the will, and continued:] The testator had real and leasehold property, and the reference to "rents, issues and profits" is not sufficient indication to outweigh the general rule that the tenant for life is not to receive the whole of the rents of the leasehold property, seeing that there is real estate to which the word "rents" may be referred. That to my mind is the only indication in the will worthy of mention.

After the gift of the life interest there is a gift over subject to the payment of certain annuities which contains the following words: "I bequeath the residue of my said real and personal estate whatsoever the same may then consist of and wherever the same may be." Those words seem to me to negative in terms the view that the gift over indicated that there was not to be any conversion of the leaseholds. They shew that, at the death of the tenant for life, the real and leasehold estate is not necessarily to be in the same state as it was at the testator's death, but is given in whatever state it may happen to be.

On the whole I feel no doubt that the rule in *Howe* v. *Earl of Dartmouth* (1) ought to be applied and that this decision is in accordance with the bulk of those authorities which have been fully argued. I think the decisions in *Crowe* v. *Crisford* (2), *Wearing* v. *Wearing* (3), *Vachell* v. *Roberts* (4), and *In re Elmore's Will* (5) must be taken to be overruled.

I adopt the decision of Kindersley V.-C. in *Craig* v. *Wheeler* (6) as well as that of Stirling J. in *In re Game.* (7)

FARWELL L.J. I am of the same opinion. The rule in *Howe* v. *Earl of Dartmouth* (1) was laid down to give effect to the true

(1) 7 Ves. 137a.
(2) 17 Beav. 507.
(3) 23 Beav. 99.
(4) 32 Beav. 140.
(5) 9 W. R. 66.
(6) 29 L. J. (Ch.) 374.
(7) [1897] 1 Ch. 881.

intention of testators in cases where there was a gift to one or more tenants for life with remainders over. Lord Cottenham in *Pickering* v. *Pickering* (1) shews that it is not a mere artificial rule, but a beneficial rule for effectuating the intention of testators: "How is the apparent intention to be ascertained, if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund."

In this particular case counsel for the appellant said that some of the leaseholds were held for quite short terms, so that there is every probability of the tenant for life using up these leaseholds in her own lifetime. It was to prevent this that the rule was laid down, and all that we are concerned to do is to see whether there is any indication in the present will of an intention that the rule shall not have effect. The only thing in the will from which any such contrary intention might be inferred is the gift of the "rents, issues and profits" to the widow for life; but in considering the effect of that expression it becomes necessary to deal with two classes of authorities which are in direct contradiction.

In my opinion *In re Game* (2) and *Craig* v. *Wheeler* (3) are rightly decided, and it follows that the decisions in *Crowe* v. *Crisford* (4), *Wearing* v. *Wearing* (5), and *Vachell* v. *Roberts* (6), as well as in *In re Elmore's Will* (7), where Stuart V.-C. gave no reasons for his decision, are wrong and must be overruled. The only other point that arises here has been disposed of by the Master of the Rolls. It has been held that, if a will contains a gift over, after the death of a tenant for life, of the leasehold property in specie, it negatives the presumption that the testator intended that there should be conversion. But here that effect cannot be produced by the gift over, because it is expressly

(1) 4 My. & Cr. 289, 298.
(2) [1897] 1 Ch. 881.
(3) 29 L. J. (Ch.) 374.
(4) 17 Beav. 507.
(5) 23 Beav. 99.
(6) 32 Beav. 140.
(7) 9 W. R. 66.

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negatived by the insertion of the words "whatsoever it may consist of and wherever it may be." In my opinion, therefore, there are no indications of any sort to take this case out of the rule laid down in *Howe* v. *Earl of Dartmouth.* (1)

KENNEDY L.J. I am of the same opinion and have nothing to add.

Solicitors: *Calder Woods & Pethick, for Urry, Woods & Co., Ventnor; Crowders, Vizard, Oldham & Co., for Windeatt & Windeatt, Totnes.*

G. A. S.

NEVILLE J. 1912 *June 7.*

BAYLIS *v.* BISHOP OF LONDON.

[1911 B. 502.]

Tithes — Bankruptcy of Incumbent — Sequestration of Benefice — Recovery of Tithes paid by Mistake of Fact—Liability of Bishop—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 52—*Tithe Act,* 1891 (54 & 55 *Vict. c.* 8), *s.* 1; *s.* 10, *sub-s.* 2.

Tithes paid under a mistake of fact to the sequestrator of a benefice appointed by an order made by the bishop under s. 52 of the Bankruptcy Act, 1883, are recoverable from the bishop as the party responsible for the execution of the sequestration, even although they have been paid over to the trustee in bankruptcy of the incumbent of the benefice before any demand for repayment is made.

WITNESS ACTION.

This was an action to recover tithe commutation rent-charge paid under a mistake of fact in these circumstances.

A testator who died in 1887 made two wills, one relating to freeholds and the other to leaseholds, and the plaintiffs were the present trustees of those wills. The testator held the leaseholds for a term of sixteen years under a lease granted by one Ravenor in 1879 whereby the testator covenanted to pay (inter alia) the tithe rent-charge payable in respect of the demised premises. The freeholds and leaseholds adjoined each other and were situate in the parish of Greenford in the diocese of London. An apportioned tithe commutation rent-charge was payable to the

(1) 7 Ves. 137a.

rector of Greenford in respect of each property. The testator occupied both properties and for some years prior to his death paid the tithe rent-charge in respect of both properties in one sum on one demand note for one sum (being the aggregate amount of the tithe rent-charge for both properties) sent in to him from time to time by a firm of Davis & Davis, the collectors for the rector. The demand notes were headed "No. 285 &c.," sometimes only "No. 285," this number being the number on the tithe map of one parcel of the testator's freeholds. After the testator's death similar demand notes for the tithe rent-charge in one sum and headed in like manner were from time to time sent in by Davis & Davis to the trustees of the testator's will, who continued to pay the same until October, 1910, in forgetfulness of the fact that the lease had determined in 1895 and under the impression that the whole of the tithe rent-charge demanded was payable in respect of the testator's freeholds.

In the meantime, in 1895, the rector of Greenford was adjudicated a bankrupt, and on June 17, 1897, the then Bishop of London, on the application of the trustee in bankruptcy under s. 52 of the Bankruptcy Act, 1883, made a sequestration order whereby, after reciting the proceedings in the bankruptcy, he appointed his secretary sequestrator of the benefice and directed him to collect and receive the tithes and emoluments of the benefice and to account to him (the bishop) for the same. Under this order the sequestrator employed Davis & Davis, as his local agents, to collect the tithes and emoluments of the benefice for the purposes of the sequestration, and, after paying thereout the stipend of the curate and other outgoings as directed by the bishop, paid over the balance to the trustee in bankruptcy. This sequestration was still in force. Neither Davis & Davis, nor the sequestrator, nor the bishop, had any knowledge of the title of the testator or of his trustees, or of the existence or determination of the lease.

The mistake as to the leaseholds was first discovered in October, 1910, and thereupon the plaintiffs, who had been appointed trustees of the testator's wills in 1906, applied to the bishop, as the person responsible for the execution of the writ of sequestration, to repay them six years of the tithe rent-charge so

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by mistake demanded by and paid to the sequestrator through Davis & Davis in respect of the leaseholds, but the bishop declined to repay the same. Thereupon the plaintiffs issued the writ in this action and claimed repayment of the sum of 197*l.* 6*s.* 11*d.* as moneys had and received by the bishop for their use, being moneys demanded from and paid by the trustees since the year 1904 under a mistake of fact by and to the sequestrator of the benefice of Greenford for tithe rent-charge in respect of lands at Greenford not occupied or owned by them.

After the commencement of the action the sequestrator under s. 1 and s. 10, sub-s. 2, of the Tithe Act, 1891 (54 & 55 Vict. c. 8), recovered 72*l.* 1*s.* 3*d.* from Ravenor, being two years' arrears of tithe rent-charge payable by him as the owner of the lands that had been comprised in the lease, and paid over the same to the plaintiffs, thereby reducing their claim to 125*l.* 5*s.* 8*d.*

The bishop by his defence pleaded that he was not acting as a principal in collecting and receiving the tithe rent-charge, as the plaintiffs well knew, but on the contrary was acting wholly and solely as agent collecting and receiving the same for and on behalf of the trustee in bankruptcy; and that, before he (the bishop) received any notice of the mistake of fact and before the plaintiffs made any claim for repayment, he had paid over to the trustee in bankruptcy or duly accounted to him for all tithe rent-charge and other moneys received by him and his agents under the sequestration, and therefore the plaintiffs were not entitled to recover from him the moneys they claimed or any part thereof.

Jenkins, K.C., and *Manby*, for the plaintiffs. In the first place, on the evidence, the plaintiffs have paid under a mistake of fact. They paid believing they had to pay and in bona fide entire forgetfulness of the fact that the lease had expired, and it is no defence to their claim to say that they had the means of knowledge and were negligent: *Kelly* v. *Solari*. (1) Secondly, the sequestrator of a benefice appointed by the bishop under a writ of sequestration is the mere bailiff of the bishop who is the principal and directs the sequestrator to act for him as his collector and receiver: *Harding* v. *Hall*. (2) The bishop in fact

(1) (1841) 9 M. & W. 54. (2) (1842) 10 M. & W. 42, 53.

stands in the same position as a sheriff—*Rex* v. *Bishop of London* (1)—and is responsible, just as a sheriff is responsible if he pays the wrong person. The case most like the present is *Durrant* v. *Ecclesiastical Commissioners for England and Wales* (2), where an order was made for repayment of tithes paid under a mistake of fact.

Lord R. Cecil, K.C., and *F. Phillips*, for the defendant. The trustees have paid the tithes with the knowledge that they would be paid over to some one else who could not know the real facts. They must have known that the lease had expired in 1895, for no rent has been paid since then. They have been negligent. It will be a great hardship on the bishop if he has to repay, because he cannot possibly recover from any one else. It is agreed that money paid under a mistake of fact is recoverable, but that is on the principle that a man shall not make a profit out of the mistake of another, and if an agent has received it and paid it over to his principal before the mistake is discovered he is not liable in an action by the person who has paid it: *Buller* v. *Harrison.* (3) Here the bishop is not the principal, but the agent to collect the emoluments of the benefice for the trustee in bankruptcy. He is a mere conduit pipe to pass on to the trustee in bankruptcy the balance of the moneys collected after providing for the spiritual needs of the parish and other necessary outgoings. It is possible that the plaintiffs may recover it from the trustee in bankruptcy. Assuming that the bishop is in the position of a sheriff, there is no direct authority that a sheriff is liable to repay money that has come into his hands by mistake and that he has paid over to a third party, but in *Snowden* v. *Davis* (4) and *Peto* v. *Blades* (5) there are indications that he would not be liable. In the latter case the auctioneer of the sheriff was sued for having sold, knowing he had no title, and Gibbs C.J. says: "The objection is, that the sheriff having paid over the money, the plaintiff is not entitled to recover it back, on the principle that where the agent has received money and paid it over to his principal, then the action will not lie:

(1) (1822) 1 Dow. & Ry. 486.
(2) (1880) 6 Q. B. D. 234.
(3) (1777) 2 Cowp. 565, 566.
(4) (1808) 1 Taunt. 359.
(5) (1814) 5 Taunt. 657.

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should have held in this case, that an action for money had and received did not lie." It is submitted that that dictum applies to this case. It is not consonant with justice that the bishop should be made to pay for the plaintiffs' mistake. *Durrant* v. *Ecclesiastical Commissioners for England and Wales* (1) is distinguishable because there the commissioners were the owners of the tithes and had received the money paid by mistake. Secondly, the plaintiffs in order to recover must shew that if the mistake of fact had been true they would have been liable to pay the money: *Aiken* v. *Short* (2); but since March 26, 1891, when the Tithe Act, 1891, came into operation, the testator's trustees were no longer personally liable for the tithe rent-charge, and the demand in respect of the leaseholds should have been referred to Ravenor, the lessor. Therefore from 1891 to 1895 the trustees paid, it is submitted, under a mistake of law and not of fact. That was the real operative cause of the mistake, and since 1895, if the trustees have paid under a mistake of fact, it is a mistake of fact for which, if it had been true, they would not have been liable to pay. Thirdly, the testator's estate was undoubtedly liable to pay this tithe rent-charge up to 1895, and the fact that it was no longer liable after that date could not be known to Davis & Davis, or the rector, or the bishop, who continued to send in the demand notes to the persons who had hitherto paid it for years, and the continued payment by them amounts to a representation that they were the owners and liable to pay, and the principle of estoppel applies.

Jenkins, K.C., in reply, referred to Edwards on Execution, p. 90, on the position of a sheriff.

NEVILLE J. This is a peculiar case, and the question I have to consider in the first place is whether the money which was paid by the plaintiffs on the demand of the sequestrator was money paid under a mistake of fact. Having regard to the circumstances of the case I think it was. Then comes the question whether, within the period of the Statute of Limitations, the bishop who on the application of the trustee in bankruptcy appointed the sequestrator is liable to repay the money so paid

(1) 6 Q. B. D. 234. (2) (1856) 1 H. & N. 210, 215.

by mistake. I think the authorities, especially the case of *Harding* v. *Hall* (1), shew that a sequestrator appointed by the bishop is the mere agent or bailiff of the bishop who stands in the same position as a sheriff, and that the receipt of the sequestrator for money paid to him is the receipt of the bishop. Therefore the bishop as between himself and the payer is the principal. It seems equally clear on the authorities that if money is paid by mistake to an agent for the use of his principal, and the agent pays it over before its repayment is demanded, the agent is not liable, and the question is whether that principle can be extended to include a bishop acting under a sequestration order who, although a principal, is legally liable to pay and apply the emoluments of the benefice in a particular manner. I have come to the conclusion that this money reached its destination when it came to the hands of the bishop through his agent the sequestrator. I hold, therefore, that the bishop, as a principal, must pay the plaintiffs the 125*l.* 5*s.* 8*d.*, which is the balance of the amount claimed by them, with costs.

Solicitors: *R. R. Norman; Lee, Bolton & Lee.*

(1) 10 M. & W. 42.

H. L. F.

PARKER J.
1912
May 9, 23.

GOODFELLOW *v.* NELSON LINE (LIVERPOOL), LIMITED.

[1912 G. 704.]

Company—Debenture-holders—Trust Deed — Resolution of Majority binding Minority — Scheme making Special Provisions for Special Interests — Bribe.

The power conferred by a trust deed on a majority of debenture-holders to bind a minority must be exercised bona fide, and the Court will interfere to prevent unfairness or oppression; but, subject to this, each debenture-holder may vote with regard to his individual interests, though those interests may be peculiar to himself and not shared by other debenture-holders.

A secret bargain by one debenture-holder for special treatment might be considered as corrupt and in the nature of bribery, but there can be no question of bribery where a scheme openly provides for the separate treatment of persons with special interests, and such persons are not incapacitated from voting on the scheme. Where, however, there are diverse interests, and none the less where those diverse interests are specially provided for, the Court ought to consider carefully the fairness of any scheme by which a majority seeks to bind a minority.

The company had issued debentures to the amount of 200,000*l.* bearing interest at 4½ per cent., and guaranteed, as to 150,000*l.* part thereof, by the Law Guarantee Society (now in voluntary liquidation), and, as to the remaining 50,000*l.*, by the B. S. Investment Trust, 47,000*l.* of these debentures being taken up by the Trust itself. The Society and Trust were joint trustees of a trust deed securing the debentures and providing for remuneration and certain payments to the Society and Trust in consideration of their respective guarantees, and giving to a majority of the debenture-holders usual powers to bind a minority. The Society through its liquidators recently offered to retire from the trusteeship and to forgo any further payments under the trust deed in consideration of being released from its guarantee. The company desired to accept this offer and submitted a scheme to the debenture-holders providing that they should accept non-guaranteed debentures bearing interest at 5 per cent. in lieu of the guaranteed debentures bearing interest at 4½ per cent., and also providing in effect that all payments falling to be made by the company to the Trust under the trust deed should remain unaffected except that the Trust should give credit for the additional 10*s.* interest on the debentures formerly guaranteed by them. Without this provision the Trust would not have supported the scheme. A resolution in favour of the scheme was passed by the requisite majority of debenture-holders, the Trust (without whose vote it would not have been carried) voting in favour of the resolution. The

plaintiff, the holder of a debenture guaranteed by the Society, impeached the resolution on the ground that the payments to be made to the Trust were in the nature of a bribe to induce the Trust to vote in favour of the scheme:—

Held, that the separate treatment of the Trust openly provided for by the scheme was not in the nature of a bribe; that the Trust was not thereby incapacitated from voting on the scheme; and that the resolution being carried by the requisite majority was valid and binding on the plaintiff.

MOTION.

In 1907 the defendant company issued a series of debentures amounting to 200,000*l.* bearing interest at 4½ per cent. per annum and maturing on September 30, 1917, though after September 30, 1910, the company could redeem them at 5 per cent. premium. These debentures were as to 150,000*l.* guaranteed by the Law Guarantee Trust and Accident Society, Limited (hereinafter called the Society), and as to 50,000*l.* by the British Steamship Investment Trust, Limited (hereinafter called the Trust). Those guaranteed by the Society were all issued to the public, as were also 2500*l.* of those guaranteed by the Trust, the remainder being taken up by the Trust itself.

The debentures were secured by a trust deed dated September 30, 1907, of which the Society and the Trust were joint trustees, clause 11 of which provided for the establishment of a sinking fund by the payment to the trustees by the company of a sum of 10,000*l.* on each September 29 so long as any debentures remained outstanding and for the payment of such sums by the trustees to the Society for investment as therein mentioned, and it was thereby declared that the Society should pay to the company interest at the rate of 4*l.* per cent. per annum on such sums and should account to the company in cash for the full amount of the several sums received by them, whether invested by them or not, but should be at liberty to retain for their own use any interest arising on the investments made without being liable to account for the same.

Clause 21 provided for the payment to each of the trustees as remuneration for their services of the sum of 157*l.* 10*s.* in each year.

Clause 22 provided for the payment by the company to the

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Society and to the Trust respectively in each year up to and including September 30, 1911, of an annual premium at the rate of 10*s.* per cent. per annum on the amount of the debentures for the time being guaranteed by each of them respectively in addition to the sums of 4422*l.* 5*s.* 8*d.* and 1474*l.* 1*s.* 11*d.* respectively paid to them on the execution of the trust deed in respect of their guarantees; and further that in the event of the debentures remaining unpaid on September 30, 1912, the company would on that day pay to the Society and the Trust respectively the further sums of 2211*l.* 2*s.* 10*d.* and 737*l.* 1*s.* respectively, and would on September 30, 1912, and thereafter on September 30 in each year, so long as the Society and the Trust respectively should be under any liability in respect of their guarantees, pay to the Society and the Trust respectively an annual premium of 16*s.* 3*d.* per cent. on the amount of the debentures for the time being under guarantee by each of them respectively.

Schedule V. to the trust deed contained provisions for holding meetings of the debenture-holders, and a resolution of the debenture-holders passed by a majority of three-fourths of the persons voting thereat was made binding in respect of the matters therein specified on all the debenture-holders. These included a power to agree to accept any other property or securities instead of the debentures and in particular any shares, debentures, or debenture stock of the company.

The first 10,000*l.* representing the sinking fund came into the hands of the Society alone under clause 11, but by a supplemental trust deed of September 28, 1909, a new arrangement was made under which the subsequent moneys payable under that clause were invested in the joint names of the Society and the Trust.

In 1909 the Society went into voluntary liquidation, which was continued under a supervision order, and recently offered through its liquidators to retire from the trusteeship and to forgo any further payments in respect of the guarantee and to repay the 10,000*l.* advanced from the sinking fund in consideration of being relieved from the guarantee. The company were desirous to accept this offer and proposed to ask the debenture-holders to accept non-guaranteed debentures bearing interest at 5 per cent. per annum instead of the existing debentures carrying interest at

4½ per cent. per annum. It was found, however, that the Trust, who were satisfied that the debentures were well secured, would not accept this scheme, and that the scheme had no chance of being carried by the necessary majority of debenture-holders unless the Trust voted in favour of it. It was therefore proposed to add to the scheme certain provisions under which the payments to the Trust under the trust deed would remain unaffected, except that credit would be taken for the additional 10*s.* per cent. payable on the new and unguaranteed debentures to be issued in exchange for the existing debentures.

The notice, dated March 5, 1912, issued to the debenture-holders summoning the meeting for passing a resolution for giving effect to this scheme was as follows:

"There will be a meeting of the holders of debentures of this company at the Baltic Sale Room, No. 24, St. Mary Axe, in the city of London, on the 14th day of March, 1912, at 11.30 o'clock in the forenoon, to consider and, if thought fit, to pass certain resolutions as a result of which the debenture-holders of the company will exchange their debentures for new debentures of the company for the same amount and in similar form but carrying interest at the rate of 5 per cent. per annum as from the 1st day of October, 1911, and not carrying any guarantee either by the Society or the Trust. It will be remembered that of the 200,000*l.* debentures of the company 150,000*l.* were guaranted by the Society, and the remaining 50,000*l.* by the Trust, and in consideration of these guarantees considerable sums are payable by way of premiums to the last named companies and also fees for substantial amounts as remuneration to the companies for their services as trustees for the debenture-holders. Securities to the value of 10,000*l.*, or thereabouts, are standing in the name of the Society alone, these being investments of sums paid to the Society under the sinking fund provisions contained in the trust deed prior to a supplemental agreement of the 28th September, 1909, since which date further securities of the value of 30,000*l.*, or thereabouts, have been placed in the joint names of the two trustee companies. Having regard to the liquidation of the Society it seemed to the company desirable that the Society should retire from the trusts

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of the debenture trust deed and the directors entered into negotiations with the liquidators of the Society with that end in view. Considerable difficulty, however, arises as to the legal right (if any) of the company or its debenture-holders as regards the 10,000*l.* invested in the Society's name alone, or of the company's right to insist upon the retirement of the Society so long as the latter remains liable in respect of its guarantee of debentures, and the liquidators were not willing to assent to the proposals of the company except upon the footing that the guarantee of the Society was in some way extinguished.

"The position of the company as appearing in its recent balance-sheets and profit and loss accounts is so satisfactory that it is believed that there is no reasonable possibility of any claim being made in respect of such guarantees, the assets of the company being far more than sufficient to discharge any sums due to the debenture-holders. Accordingly it is anticipated that the debenture-holders will take the view that it will be to their interests to exchange their debentures for debentures carrying five per cent. interest, but not carrying any guarantee. If this is done the Society will retire from the trusts and the various funds in their possession will immediately be handed over to the Trust, who subject to the approval of the debenture-holders will act for the future as sole trustees for the debenture-holders. The company has agreed to pay certain sums to the Trust to induce that company to come into the proposed arrangement, but on the other hand the amounts payable by the company under the provisions of the trust deed both for premiums and for trustee's fee will be largely reduced and the benefit of this saving is one which will enure to the advantage of the debenture-holders' security.

"A supplemental trust deed to give effect to the above proposals has been prepared and a draft thereof can be seen at the offices of Messrs. William A. Crump & Son, 17, Leadenhall Street, E.C., at any time prior to the meeting, and a resolution will be submitted to the meeting for approving such supplemental trust deed."

The draft supplemental trust deed referred to in the above notice provided for the surrender of the existing debentures and

the issue of the new debentures in lieu thereof, and further provided, clause 3, that in the event of the 50,000*l.* new debentures to be issued in exchange for the said 50,000*l.* debentures guaranteed by the Trust remaining unpaid on September 30, 1912, the company would on that day pay to the Trust the sum of 737*l.* 1*s.*, as provided by clause 22 of the original trust deed, and further would on the said September 30, 1912, and thereafter on September 30 in each year pay to the Trust in lieu of the annual premium payable to the Trust under clause 22 such an annual sum as would be equal to 16*s.* 3*d.* per cent. on the amount of the aforesaid 50,000*l.* new debentures for the time being outstanding, and that save as aforesaid the provisions of the said clause 22 should cease to operate. Clause 4 provided that the Trust should thenceforth be the sole trustee of the original trust deed, but should be entitled as such sole trustee only to such remuneration as was payable to the Trust under clause 21 of the original trust deed.

At the meeting on March 14, 1912, the resolution was passed by the requisite majority, the Trust in respect of their 47,500*l.* debentures and the holders of the remaining 2500*l.* debentures guaranteed by the Trust voting in favour of the scheme, and but for the vote of the Trust it would not have been carried by the requisite majority.

Under these circumstances the plaintiff, Elizabeth Constance Goodfellow, contended that the resolution was not binding on her because the company procured it to be passed by bribing the Trust, and on April 12, 1912, issued the writ in this action against the company claiming a declaration that the resolution of March 14, 1912, and any supplemental trust deed executed in pursuance of such resolution were not and would not be binding on the plaintiff, and that the plaintiff was not bound to surrender to the company the debentures held by her. The plaintiff now moved for an interim injunction to restrain the company from acting on the said resolution, and the motion by consent was treated as the trial of the action. It was stated that the action was brought with the approval and support of fifty-two debenture-holders holding in the aggregate debentures for 29,980*l.*

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Romer, K.C., and *Rolt*, for the motion. The payments to the Trust provided for by clause 3 of the supplemental deed are in the nature of a bribe, being the inducement to the Trust to vote for the scheme, without which inducement the Trust would not have voted in favour of the resolution, in which case it would not have been carried. This is a bargain to give the Trust a peculiar benefit, and, according to the principles stated by Lord Cairns L.J. in *Ex parte Cowen* (1), the resolution carried by virtue of such a bargain is not binding on a non-assenting debenture-holder.

Maugham, for the company. It is a total misuse of language to describe these payments as a "bribe." The Trust as guarantors had already earned the commuted premium proposed to be paid to them. If the scheme does not go through the company will still have to make these payments under the original trust deed. The real question is, in what capacity is the payment made to the Trust? The answer is that it is made to them not in the character of debenture-holders, but in that of guarantors and as part of the scheme. There was no secrecy about the matter, and a scheme may properly provide for the different treatment of persons having diverse interests. *Shaw* v. *Royce, Ld.* (2) shews that the scheme is not an unfair one.

Romer, K.C., in reply.

Cur. adv. vult.

May 23. PARKER J. read the following judgment:—In 1907 the defendant company issued a series of debentures, amounting to 200,000*l.*, bearing interest at 4½ per cent. per annum and maturing on September 30, 1917, though after September 30, 1910, the company could redeem the same at a 5 per cent. premium. These debentures were as to 150,000*l.* guaranteed by the Law Guarantee Trust and Accident Society, Limited (whom I will call the Society), and as to 50,000*l.* by the British Steamship Investment Trust, Limited (whom I will call the Trust). They were secured by a trust deed of which the Society and the Trust were joint trustees. Those guaranteed by the Society were issued to the public, as were also 2500*l.* of those guaranteed by the Trust. The remainder of those guaranteed

(1) (1867) L. R. 2 Ch. 563, 569, 570. (2) [1911] 1 Ch. 138.

by the Trust were taken up by the Trust itself. The deed contained provisions for holding meetings of the debenture-holders, and a resolution of the debenture-holders passed by a certain majority was made binding, in respect of certain matters therein specified, on all the debenture-holders.

The plaintiff, who holds a debenture guaranteed by the Society, claims in this action to restrain the company from acting on a resolution of the debenture-holders passed on March 14, 1912, adopting a scheme of arrangement under which the guaranteed debentures are to be exchanged for non-guaranteed debentures of the company bearing a higher rate of interest. It is admitted that the resolution was passed by the requisite majority at a meeting of the debenture-holders duly convened and held under the trust deed, and it is also admitted that the scheme was a matter in which the majority had, under the trust deed, power to bind the minority. The plaintiff, however, contends that the company procured the resolution to be passed by something in the nature of bribery, and that therefore it was invalid and of no effect.

The material facts on which this contention is based are as follows. Under the trust deed the company paid the annual sum of 157*l.* 10*s.* to the Society, and a like annual sum to the Trust, by way of trustees' remuneration. Further, unless the debentures are paid off before September 30, 1912 (and the company has no intention of so paying them off), large sums will become payable by the company to the Society and Trust respectively in respect of their respective guarantees. The sum thus payable to the Society will in all probability exceed 10,200*l.*, and the sum thus payable to the Trust will in all probability exceed 3400*l.*

Moreover the deed contains a clause providing for a sinking fund of 10,000*l.* per annum, payable by the company to the trustees, but the trustees are bound to advance the moneys paid to them in respect of this fund to the Society, and the Society can invest the same for its own benefit, paying the trustees interest at 4 per cent. per annum until the debentures mature or are paid off. It is doubtful whether, on the true construction of the deed, the trustees are not merely unsecured creditors of the Society for the moneys so advanced. The first 10,000*l.* paid

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by the company in respect of the sinking fund came into the hands of the Society under these provisions. As to subsequent instalments a fresh arrangement was made.

In December, 1909, the Society went into voluntary liquidation, and recently offered through its liquidators to retire from the trusteeship and to forego any further payments in respect of the guarantee, and to repay the 10,000*l.* advanced from the sinking fund, in consideration of being relieved from the guarantee. The company desired to accept this offer, but of course could not do so without the concurrence of the debenture-holders. They proposed therefore to ask the debenture-holders to accept non-guaranteed debentures carrying interest at 5 per cent. per annum in lieu of the existing guaranteed debentures carrying interest at 4½ per cent. per annum. It was obvious, however, that this scheme would not be acceptable to the Trust. The Trust were (and as far as the evidence goes with good reason) satisfied that the debentures were well secured, and that there was little, if any, risk of any payment having to be made under the guarantees.

Under these circumstances the company proposed to add to the scheme certain provisions, the effect of which was intended to be and indeed was that the payments falling to be made by the company to the Trust in respect of the guarantee would remain unaffected, except that credit would be taken for the additional interest of 10*s.* per cent. per annum payable on the new and unguaranteed debentures to be issued in lieu of those guaranteed by the Trust. The Trust intimated their willingness to accept the scheme with these provisions, and the company thereupon sent out a circular to the debenture-holders convening a meeting for March 14, 1912, to consider, and, if thought proper, pass, resolutions adopting the scheme with these provisions. It is to be observed that unless the Trust were satisfied with the terms of the scheme it was hardly worth while convening any meeting, for the Trust held 47,500*l.* of the debentures and were guarantors for a further 2500*l.*, and it was practically certain that no scheme could be carried by the requisite majority if it were opposed by the Trust. It is further observable that the special provisions to be made in favour of the Trust were

prominently referred to in the notice convening the meeting, and were part of the scheme submitted to the meeting.

At the meeting the scheme was, in fact, approved by the requisite majority. But the Trust, in respect of its holding of 47,500*l.*, and also the holders of the further 2500*l.* guaranteed by the Trust, voted in favour of the scheme, and it is clear that but for the fact that the Trust voted in favour of the scheme the resolution adopting it would not have been carried by the requisite majority. Under these circumstances the plaintiff contends that the resolution is not binding on her, notwithstanding the provisions of the trust deed, because, she says, the company procured it to be passed by bribing the Trust.

It appears to me that the term "bribery" cannot be used appropriately in connection with this case. The powers conferred by the trust deed on a majority of the debenture-holders must, of course, be exercised bona fide, and the Court can no doubt interfere to prevent unfairness or oppression, but, subject to this, each debenture-holder may vote with regard to his individual interests, though these interests may be peculiar to himself and not shared by other debenture-holders. No one could have objected to the Trust voting for a scheme merely because its operation would put an end to all liability under the guarantee, or against a scheme merely because its operation might put an end to all payments accruing under the guarantee. Further, where, as in this case, there is, as between different holders, a diversity of interest, it may be necessary or advisable, as a matter of business fairness, to make special provision for special interests, and I do not think there is any equity precluding a debenture-holder voting for or against a scheme containing such special provision merely because he is interested thereunder.

A secret bargain by one debenture-holder for special treatment might be considered as corrupt and in the nature of bribery, but, in my opinion, there can be no question of bribery where a scheme openly provides for the separate treatment of persons with special interests. The only question is whether these persons are incapacitated from voting on the scheme, and I can see no grounds in equity for so holding. I think, however, that,

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where there are diverse interests, and none the less where those diverse interests are specially provided for, the Court ought to consider carefully the fairness of any scheme by which a majority of debenture-holders seeks to bind a minority.

Supposing in the present case that the Society were absolutely insolvent, so that it were a matter of indifference to the holders of the 150,000*l.* guaranteed by the Society whether the guarantee were released or otherwise, it might, I think, be considered unfair for the majority to force the holders of the 2500*l.* debentures guaranteed by the Trust to release the security afforded to them by this guarantee. As a matter of fact, however, these holders have voted for the scheme, so that this question cannot arise. Having carefully considered the whole matter, I cannot see, nor do I think it was seriously contended, that the scheme is unfair on the minority, except in so far as it may be said to be unfair that a majority should have any powers at all to bind a minority. The case was argued entirely on the footing of bribery, and I hold that the plaintiff is not entitled to succeed on this ground. The parties having agreed to treat this motion as the trial, I think the proper order will be to dismiss the action with costs.

Solicitors: *Oldfields; W. A. Crump & Son.*

A. C.

In re CRUTCHLEY.
KIDSON *v.* MARSDEN.

[1912 C. 819.]

PARKER J.
1912
May 21, 24.

Will—Construction—Reading "or" as "and"—Gift Over.

A testator gave two freehold houses to S. for her own use and disposal "subject only to the following conditions, viz. in the event of the said S. dying intestate or childless or under the age of twenty-one (but not otherwise) the said two houses and premises shall become the property of" M.

S. survived the testator, attained the age of twenty-one years, and died a spinster intestate:—

Held, that a gift over in the event of the first absolute taker dying intestate and childless was void for repugnancy; that the first or the second "or" must be read as "and"; and that on this construction S. took absolutely and the gift over failed.

THOMAS CRUTCHLEY by his will, dated November 10, 1888, gave his personal estate to his wife, Ellen Crutchley, and appointed her sole executrix; and he gave his ten freehold houses in Bell Lane, Bloxwich, and his two freehold dwelling-houses in Church Street, Bloxwich, and all other his real estate to the said Ellen Crutchley during her life and after her death unto and to the use of George Kidson and George Bushnell, their heirs and assigns, upon certain trusts with reference to the houses in Bell Lane. The will then continued as follows: "I direct the said George Kidson and George Bushnell their heirs and assigns to hold all my said dwelling-houses and premises and other my real estate, Upon trust as follows: all those two freehold dwelling-houses and premises situate in Church Street, Bloxwich, aforesaid, I bequeath unto my wife's niece Florence Ann Smith for her own use and disposal, subject only to the following conditions, viz. in the event of the said Florence Ann Smith dying intestate or childless or under the age of twenty-one (but not otherwise) the said two houses and premises shall become the property of my wife's brother Richard Marsden of Sheffield, Yorkshire, table knife cutler, his heirs and assigns absolutely." The will then declared the trusts of the ten houses in Bell Lane.

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The testator died on May 2, 1889, and his will was proved by Ellen Crutchley, his widow.

Ellen Crutchley died on June 2, 1909.

Florence Ann Smith attained the age of twenty-one years, and died a spinster and intestate on July 1, 1910. She had six brothers and sisters, namely, Ellen Maria Holden, James Thomas Smith, George Frederick Smith, Caroline Mary Cawthorne, Charles Wilfrid Smith, and Ada Priscilla Smith. Ada Priscilla Smith died an infant in the lifetime of Florence Ann Smith, and James Thomas Smith, her eldest brother, died on June 30, 1910, leaving several children, one of whom, James Willie Smith, was the heir-at-law of Florence Ann Smith, her father having died about 1883.

Richard Marsden died intestate on May 1, 1890, leaving several children, one of whom, George William Marsden, was his heir-at-law.

G. Bushnell died about 1900.

George Kidson, the surviving trustee of the will, took out an originating summons against G. W. Marsden and James Willie Smith for the determination of the question whether, Florence Ann Smith having survived the testator's widow and died a spinster and intestate after attaining twenty-one, the trusts by the will declared as to the two houses in Church Street, Bloxwich, in favour of Richard Marsden, his heirs and assigns, took effect on the death of Florence Ann Smith, or whether she was under the trusts of the will indefeasibly entitled to the fee simple of the two houses, subject to the life interest of the testator's widow.

The summons was adjourned into Court and heard by Parker J. on May 21, 1912.

Horace Freeman, for the plaintiff, stated the facts and the question involved.

J. G. Wood, for the defendant Marsden. This is not a composite condition, but there are three separate conditions on the happening of any one of which the gift over was to take effect, namely, if Florence Ann Smith should die intestate, or if she should die childless, or if she should die under the age of

twenty-one. As she died intestate and also childless, the gift over took effect. This is not a case in which "or" should be read "and." [He referred to *Stretton* v. *Fitzgerald.* (1)]

Dighton Pollock, for the defendant Smith. There is an absolute gift to Florence Ann Smith, and in such a case very plain words are required to divest the absolute interest. The Court will regard the intention of the testator and will, if necessary, read "or" as meaning "and." This has been done in many cases, although the effect has been to make a gift over void; as, for instance, in *Denn* v. *Kemeys* (2); *Eastman* v. *Baker* (3); *Morris* v. *Morris* (4); *Greated* v. *Greated* (5); *Green* v. *Harvey.* (6) And death without leaving issue surviving has been construed as meaning such a death under twenty-one: *Brotherton* v. *Bury.* (7)

In the present case if the second "or" is read as "and," as it should be, the gift over will not take effect. [He also referred to Theobald on Wills, 6th ed. p. 674, Jarman on Wills, 3rd ed. vol. i. p. 472, and *Olivant* v. *Wright.* (8)]

J. G. Wood in reply.

Cur. adv. vult.

May 24. PARKER J. There is no doubt upon the authorities that if there be a devise or bequest to A. absolutely, but, if he die childless or under the age of twenty-one years, then over, the word "or" will be read "and," and the gift over will not take effect unless both events happen. This rule of construction depends upon a presumed intention of the testator to benefit the children of A. directly or indirectly, an intention which would be defeated if A. died under twenty-one leaving children and the word "or" were construed disjunctively.

The same principle is adopted where there is a devise or bequest to A. absolutely, but, if he die childless or intestate, then over, and that, too, though the substitution of "and" for "or" would make the whole gift over void for repugnancy.

(1) (1889) 23 L. R. Ir. 310, 466.
(2) (1808) 9 East, 366.
(3) (1808) 1 Taunt. 174.
(4) (1853) 17 Beav. 198.
(5) (1859) 26 Beav. 621.
(6) (1842) 1 Hare, 428.
(7) (1853) 18 Beav. 65.
(8) (1875) 1 Ch. D. 346.

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The gift over in the present case is expressed to be in the event of the first taker dying intestate or childless or under the age of twenty-one years. There is no authority covering such a case, but I can see no reason why, on the principle of the cases to which I have referred, either the first or the second "or" should not be read conjunctively. There may be a difficulty in reading both conjunctively, for a person who dies under the age of twenty-one years must necessarily die intestate. If, however, either "or" can be read conjunctively, the gift over does not take effect. A gift over in the event of the first taker dying intestate and childless is as much void for repugnancy as a gift over in the event of the first taker dying intestate, and if it be the second "or" which is to be read conjunctively, then the events referred to have not happened.

On the whole, I think I am bound by the authorities to read either the first or second "or" as "and," so that, in the events which have happened, I must hold that the absolute interest given to the first taker has not been divested.

I do not like altering or putting an unnatural meaning on the words of a will, and I reserved judgment in order to consider whether, on the true construction of the will in question, the gift over might not be confined to death in the lifetime of the tenant for life. I have, however, come to the conclusion that in the present state of the authorities I ought not to adopt this construction.

Solicitors for the plaintiff and the defendant Smith: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Arthur Shephard, Sheffield.*

Solicitors for the defendant Marsden: *Corbin, Greener & Cook, for S. U. Blackburn, Sheffield.*

F. E.

In re TREVOR-BATYE'S SETTLEMENT. BULL *v.* TREVOR-BATYE.

[1911 T. 842.]

PARKER J.
1912
June 4.

Settlement of Personal Estate—Power to invest in Real Estate—Purchase by Trustees of Timber Estate—Rents and Profits — Periodical Cuttings — Tenant for Life and Remainderman.

By a marriage settlement made in 1902 personal property of the wife was settled upon usual trusts, the wife taking the first life interest, and power was given to the trustees to sell any part of the trust premises and invest the proceeds in the purchase of freehold lands to be conveyed to the trustees upon trust for sale, and until sale the trustees were to pay the rents and profits to the person to whom the income of the trust premises invested in the purchase thereof would have been payable if such investment had not been made. In 1904 the trustees exercised this power and purchased an estate in the county of Buckingham, having a large number of beech trees on it. In the proper management of the estate the trustees had recently cut and sold a number of beech trees :—

Held, that the proceeds of sale arising from periodical cuttings, after deducting the expense of replanting and fencing incurred in a proper course of management, were net "profits" of the estate within the meaning of the settlement, and therefore payable to the tenant for life.

Dashwood v. *Magniac* [1891] 3 Ch. 306, followed.

Adjourned Summons.

By the settlement made on her marriage, dated July 1, 1902, personal property of Maud Jessie Sowerby Trevor-Batye (hereinafter called the wife) was settled upon trust to pay the annual income thereof to the wife during her life, without power of anticipation, and after her death to her husband during his life, and after the death of the survivor upon the usual trusts in favour of the children of the marriage, and it was thereby declared that the trustees might during the lives of the husband and wife sell any part of the trust premises and invest the moneys arising thereby in purchase of freehold lands situate in England or Wales, and that the hereditaments so purchased should be conveyed to the trustees and held by them upon trust with the consent in writing of the husband and wife during their joint

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lives, and of the survivor of them during his or her life, and after the death of the survivor, at the discretion of the trustees, to sell the same, with power to postpone such sale for such period as they might think fit, and should until the resale of the purchased hereditaments pay and apply the rents and profits thereof to the person or persons and in the manner to whom and in which the income of the trust premises invested in the purchase thereof would have been payable or applicable if such investment had not been made; and it was thereby further declared that the trustees should in reference to any lands or hereditaments for the time being held on the trusts of the same indenture have all the powers incidental to sales and until sale the powers of leasing and all other powers which by the Settled Land Acts, 1882 to 1890, and any Act amending the same are or should be conferred on a tenant for life in possession of land, such powers to be exercisable with such consent or at such discretion as aforesaid, and to be subject to any order to be made under s. 7 of the Settled Land Act, 1884.

In 1904 the trustees sold part of the trust premises, and purchased a freehold estate in the parishes of Little Hampden and Ellesborough, in the county of Buckingham, containing 391 acres, of which 115 acres or thereabouts consisted of woodlands, nearly all the trees being beech trees. The total purchase-money was 12,087*l.*, of which 2718*l.* represented the value of the timber, timberlike and other trees, tellers, pollards, and saplings down to the value of 1*s.* per stick, as then ascertained by valuation.

A considerable quantity of the beech trees appeared to have been cut on the land shortly before the completion of the purchase by the trustees in 1904, but there had been no further cutting till December, 1910. In that month and at later dates the trustees authorized sales of such trees as were considered ripe for felling and proper to be felled in the ordinary management of the woods, and these sales realized the sum of 1222*l.* The value of the beech trees left standing on the estate was equal to or greater than the value at the date of the purchase by the trustees, but it appeared that some outlay would have to be made for replanting part of the woodland and for fences.

There was one child of the marriage, who was an infant.

This was an originating summons taken out by the trustees of the settlement raising the question whether the said sum of 1222*l.*, or any or what part of such sum, should be treated by the trustees as income and payable to the wife as the person entitled to the rents, profits, and income derived from the lands, securities, and property vested in the trustees, or whether the said sum, or any and, if so, what part thereof, should be treated as capital moneys.

A. Grant, K.C., and *Warwick Draper*, for the trustees, stated the facts and referred to *Dashwood* v. *Magniac* (1) and *Honywood* v. *Honywood*. (2)

Kenneth Wood, for the infant child of the marriage. Assuming the estate to be what is known as a timber estate, still the equitable tenant for life impeachable for waste cannot take the whole proceeds of sale of periodical cuttings as against the remainderman. The whole proceeds ought to be treated as capital, or at any rate the provisions contained in s. 35 of the Settled Land Act, 1882, are applicable under which three fourths ought to be set aside as capital and one fourth only go as rents and profits. The settlement is a settlement within s. 63 of that Act. *Dashwood* v. *Magniac* (1) is distinguishable, as there the estate was not subsequently purchased, but was settled by the testator, and the majority of the Court found an intention that it was to be managed and dealt with after the testator's death in the same way as he had himself dealt with it in his lifetime.

Romer, K.C., and *Dighton Pollock*, for the wife. The law of waste has no application to the present case. The sole question is one of construction, namely, what is the true meaning of rents and profits in this settlement: see *Dashwood* v. *Magniac* (1), which was decided by Lindley and Bowen L.JJ. on the ground of intention. The costs of necessary replanting and fencing, as incidental to the proper management of the estate, must no doubt be deducted, but after making these deductions the balance of the proceeds of the periodical sales are profits of the estate within the meaning of the settlement.

(1) [1891] 3 Ch. 306. (2) (1874) L. R. 18 Eq. 306.

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PARKER J. In my opinion all that I have to do in the present case is to determine the true meaning of the language used by the settlor in this settlement. The settlor was a lady who on her marriage settled personal estate on the trusts usual in a marriage settlement and gave the trustees power to purchase freehold hereditaments. The hereditaments so purchased were to be conveyed to the trustees on trust for sale, and until the sale the trustees were to pay the rents and profits to the person to whom the income of the trust premises invested in the purchase thereof would have been payable if such investment had not been made. The real question is what the settlor intended by the words "rents and profits." There is no question of waste in the ordinary sense, because it would be the duty of the trustees in case they purchased an estate to manage it in the ordinary and normal course of agricultural or timber cultivation, according to the nature of the estate. In the present case the trustees did buy a certain estate consisting, as to considerable parts of it, of beech woods. It is the normal course in the neighbourhood to cut these periodically, and from time to time to cut out the larger trees in order to leave room for the growth of the smaller ones, so that in a well-managed beech wood there appear to be trees in three stages of growth, the old ones, the middle-aged ones, and the young ones. It is in the usual course of management to cut the older trees. That is what the trustees have done, and they have cut trees which I hold on the evidence to have been properly cut, and they have left growing on the estate woods which are of the same or greater value than those originally purchased by them. It also appears that some replanting and repairs to fences have to be done in connection with the cultivation of a timber estate. In my opinion, in order to ascertain what is fairly profit in the circumstances which I have mentioned, we must take the actual proceeds of sale, and after paying all costs of replanting, repairing, and fencing we arrive at what can be fairly called profits of the estate, and this ultimate balance according to the provisions of the settlement belongs to the tenant for life, and I am prepared to make a declaration to that effect. I am fortified in this opinion by *Dashwood* v. *Magniac* (1),

(1) [1891] 3 Ch. 306.

for, though some of the judges who decided that case dealt with it as a question between tenant for life and remainderman, and discussed the legal doctrines applicable, the Courts were really determining the meaning of the testator when he said that the "rents and profits" were to be paid to his wife for her life, and they held that, according to the true construction of the will, and in view of the fact that the testator in his lifetime had acted on that principle, he must be taken to have meant that the periodical proceeds of sale were rents and profits, and that the tenant for life was therefore entitled to them. That part of the case is analogous to the present case and fortifies me in the opinion which I have formed. I do not think, however, that I ought to make any declaration as to the future; but the general principle applicable is that which I have stated, and as regards these particular proceeds of sale I will make a declaration that, after payment of the costs of replanting and executing repairs to fences which may be necessary for the preservation of the woods as part of a timber estate, the ultimate balance may be paid to the tenant for life under the trust contained in the settlement as profits.

Solicitors: *Bull & Bull; Ellis & Ellis.*

A. C.

C. A.
1912
June 4.

H. STEVENSON & SON, LIMITED *v.* BROWNELL.

HEALY AND OTHERS, CLAIMANTS.

[1911 H. 3657.]

Practice—Interpleader—Right to issue Interpleader Summons after Final Judgment in the Action—Rules of the Supreme Court, 1883, *Order* LVII., *r.* 1 (*a*).

Interpleader is not allowable where final judgment has been given by consent, and no other proceeding in the same matter is pending.

So *held*, reversing the decision of Eve J.

APPEAL from a decision of Eve J.

By an agreement of January 8, 1909, made between Hugh Stevenson & Son, Limited (thereinafter called the company), of the first part, Richard Green Inwood and William Henry Young (thereinafter called the licensees) of the second part, and Isaac Anthony Brownell and Louis Antoine D'Aubigny D'Engelbronner (thereinafter called the syndicate) of the third part, after reciting that the company had agreements with Inwood by which a portion of the royalties received for the manufacture of wire bound boxes under a patent was payable to them and that all the parties were desirous of working together for their mutual benefit, it was agreed (1.) that the company would give up all rights under the afore-mentioned agreements as regarded the United Kingdom only; (2.) that the company should continue to shew the machinery and interest all likely purchasers; (3.) that the other parties to the agreement should use their best endeavours to grant licences to suitable parties; and (4.) the licensees and the syndicate guaranteed to the company payment of a proportion of royalties as follows: (A) 25 per cent. of the royalties received from ten firms in the United Kingdom whose names should be furnished by the company; (B) 10 per cent. of the royalties received from all other firms in the United Kingdom.

Litigation ensued in America about the patent rights in question, and the respondent Healy claimed to be interested in the royalties. On December 7, 1911, the company issued a writ in an action in the Manchester District Registry against the

syndicate for an account of what was due to them from the syndicate for royalties under the agreement and for payment of the amount found due. Upon February 22, 1912, the following order was made:—

"Upon the application of the above named plaintiffs by summons (under Order xxx. of the Supreme Court Rules 1883) dated the 19th day of December 1911 for an account of royalties due and upon hearing the solicitors on both sides and the plaintiffs and defendants by their solicitors agreeing that the royalties due from the defendants to the plaintiffs under the agreement dated the 8th day of January 1909 . . . . amounted on the 31st October 1911 to the sum of 199*l.* 0*s.* 7*d.* Therefore it is adjudged that the said sum of 199*l.* 0*s.* 7*d.* be paid by the defendants to the plaintiffs within fourteen days from the date of this judgment And it is ordered and adjudged that the defendants do pay to the plaintiffs their costs of this action such costs to be taxed by the district registrar."

On February 28, 1912, the syndicate issued an interpleader summons in the action addressed to the company and to William Patrick Healy and the Healy Box Company, Limited, as claimants, and on March 7, 1912, this summons was dismissed with costs by the district registrar on the grounds that the syndicate admitted that they were indemnified by the claimants, and of collusion between the syndicate and the claimants.

The syndicate appealed, and on March 26, 1912, Eve J. made an order that the order dated March 7, 1912, be discharged; that all further proceedings in the action against the syndicate be stayed; that the company and the claimants be restrained from proceeding against the syndicate to recover the sum of 199*l.* 0*s.* 7*d.* adjudged by the judgment in this action dated February 22, 1912, to be paid by the syndicate to the company or any damages for or in respect of the same; that the syndicate should pay into Court on or before April 16, 1912, to the credit of the action the said sum of 199*l.* 0*s.* 7*d.* to abide further order; and that the following issue be tried:—Whether the said sum of 199*l.* 0*s.* 7*d.* is the property of William Patrick Healy or of Hugh Stevenson & Son, Limited.

The company appealed.

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Astbury, K.C., and *J. Hunter Gray*, for the appellants. The issue which has been directed cannot lead to any useful result, and the order ought not to have been made. Interpleader is not allowed if the applicant has been guilty of collusion with either party. Further, we do not desire to take advantage of technical objections, but it is obviously difficult to see how there can be interpleader after judgment in the action.

[They were stopped by the Court.]

Younger, K.C., and *J. F. W. Galbraith*, for the syndicate. The application of the practice in interpleader is now unlimited in point of time. The old rule under the Interpleader Act, 1831, has been abolished and the practice is now governed entirely by the Rules of the Supreme Court, 1883, Order LVII. Rule 1 says that "relief by way of interpleader may be granted (*a*) where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto." That is in the widest possible terms and does not say that interpleader is not allowed after judgment. Rule 4 says that "where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons." So we are clearly within the language of the rule.

[Farwell L.J. No. You are not being sued and you do not expect to be sued.]

Colefax, for the claimants. Our position ought not to be prejudiced by anything which is decided on the present appeal.

Cozens-Hardy M.R. This is an appeal from an order made by Eve J. directing an issue. There are several difficulties in the way of supporting that order, but there is one to which alone I propose to refer. The plaintiffs claim under an agreement dated January 8, 1909, under which, in consideration of certain introductions which the plaintiffs were to give to customers who proposed or might be induced to take a certain patent article, they were to receive 25 per cent. in respect of the first ten orders and 10 per cent. afterwards; and the defendants guaranteed to the company that proportion. An action was commenced by

Stevenson & Son against Brownell on that agreement, a writ being issued on December 7, 1911. Then shortly afterwards the parties on looking into the matter consented to judgment. I say deliberately "consented to judgment," for I never saw a more clear instrument of consent. The order of February 22, 1912, was made on the application by the plaintiffs by summons "for an account of royalties due, and upon hearing the solicitors on both sides, the plaintiffs and defendants by their solicitors agreeing that the royalties due from the defendants to the plaintiffs under the agreement dated the 8th January, 1909, ... amounted on the 31st October, 1911, to 199*l.* 0*s.* 7*d.*" — that is to say, agreeing that the amount due from the defendants to the plaintiffs was 199*l.* 0*s.* 7*d.* —then there was judgment for 199*l.* 0*s.* 7*d.* to be paid by the defendants to the plaintiffs within fourteen days. Then just before the fourteen days had elapsed the defendants, having consented to that judgment, applied by summons that an interpleader issue might be directed on the ground that Healy or Healy's company said that they were entitled to these royalties.

Is this a case to which interpleader procedure applies? The practice is now governed by the Rules of the Supreme Court, 1883, Order LVII., r. 1. The material matter in this r. 1 is sub-s. (*a*): "Where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto." The syndicate are not being sued by two persons; they were being sued by one and there was a threat that they might be sued by another. There are not two pending proceedings at all. One matter has ripened into a judgment, and there is nothing whatever to which this rule will apply. I do not see how we can hold that, because in the Act of 1831 the time within which interpleading procedure might be commenced was limited and that Act has been repealed, under the present practice it is possible to interplead at any time after judgment has been obtained by one claimant, and even after judgment has been given by consent. In my opinion to allow this

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interpleader would be altogether contrary to the language and spirit of the Rules; and without going into the other points I think the order should be discharged with the usual consequences but without prejudice to any question of costs between the syndicate and the claimants.

FARWELL L.J. I agree.

KENNEDY L.J. I also agree.

Appeal allowed.

Solicitors: *W. J. & E. H. Tremellen, for Blair & Seddon, Manchester; Robbins & Co., for Slater, Heelis & Co., Manchester; Bristows, Cooke & Carpmael.*

H. C. R.

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In re THOMAS.

SUTTON, CARDEN & CO., LIMITED *v.* THOMAS.

[1910 T. 1705.]

Attachment—Fiduciary Relation—Executor—Judgment against Executor "de bonis propriis" — Determination of Fiduciary Relation — Debtors Act, 1869 (32 *& 33 Vict. c.* 62), *s.* 4, *sub-s.* 3.

Where a creditor has obtained in an administration action an order against the executor for personal payment of his certified debt, and he is the only creditor of the testator's estate, the fiduciary relation which originally existed between the executor and the creditor is at an end; and the creditor is not entitled to put in force against the executor the punitive jurisdiction reserved to the Court under the Debtors Act, 1869, by issuing a writ of attachment, or to obtain an order for payment into Court of money in the executor's hands, for the purpose of founding that jurisdiction.

Decision of Joyce J. reversed.

ON November 29, 1910, the plaintiff company commenced this action by originating summons as creditors for the administration of the estate of Henry Thomas, deceased. The defendant, Charles Thomas was the testator's sole executor and residuary legatee. On February 13, 1911, a full administration decree

was made in the usual form, but with a direction that none of the accounts and inquiries were to be proceeded with, except the account of what was due to the plaintiffs and all other the creditors of the testator, without the leave of the judge, and that such account was to be limited to the plaintiffs' claim. On April 5, 1911, the Master made his certificate finding that there was due to the plaintiffs from the testator's estate for principal and interest 2155*l.* 8*s.* 1*d.*

On May 9, 1911, the plaintiffs obtained an order in the action that the defendant should pay them the certified amount of their debt and costs.

On June 1, 1911, the defendant had a receiving order made against him upon his own petition; on June 20 a receiver of the testator's property was appointed in the action; and on December 22 the plaintiffs proved their debt in the bankruptcy.

The defendant then filed an affidavit shewing that there was due from him on account of the testator's estate 971*l.* 4*s.* 4*d.*, and on April 10 an order was made that the defendant should pay that sum into Court on April 24, 1912, or within four days after service of the order.

On May 10, 1912, the plaintiffs moved for and obtained leave to issue a writ of attachment against the defendant for contempt in not having obeyed the order for payment into Court. On May 17 a motion by the defendant to discharge the order of May 10 was dismissed. The defendant now appealed.

Norton, K.C., and *Manning*, for the appellant. Under s. 4 of the Debtors Act, 1869, the appellant cannot be imprisoned for making default in payment of a sum of money except in certain cases. It is alleged that he is within the third of those exceptions, which is "default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." We contend that he is not within that exception.

In the first place the plaintiffs have elected to proceed against him personally and they cannot now attack him in his representative capacity. The order of May 9, 1911, was made against him personally, and they have adopted that judgment by proving

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against his estate in bankruptcy for the personal debt due on that judgment. By doing that they lost their right against the testator's estate, and also lost, under s. 9 of the Bankruptcy Act, 1883, all their other remedies against the appellant's estate. No doubt the reason why the order of May 9, 1911, was taken in that personal form was that, the appellant being residuary legatee, the money would come into his possession and be more easily recoverable in that way. The result is that the contract has passed into the judgment: *Kendall* v. *Hamilton.* (1)

The appellant was not a trustee or person acting in a fiduciary capacity. An executor only acts in a fiduciary capacity as regards the beneficiaries under the will; no such relationship exists between him and the creditors of the estate.

[KENNEDY L.J. referred to Williams on Executors and Administrators, 10th ed. pp. 1594, 1609.]

For the purposes of s. 4 of the Debtors Act it is not sufficient to shew that the funds are trust funds; it must be shewn that the creditor is a cestui que trust: *Taaffe* v. *Fitzsimons.* (2) The respondents rely on *In re Smith* (3), but this point was not taken in that case.

W. H. Cozens-Hardy, for the respondents. *In re Smith* (3) is a conclusive authority that the Court had jurisdiction to make the order appealed from and that the appellant was acting in a fiduciary capacity. This is a punitive proceeding and is not affected by the fact that we proved in the bankruptcy.

The nature and effect of a judgment against an executor "de bonis propriis" were discussed in *Lacons* v. *Warmoll.* (4) It was obtained here because the executor was also residuary legatee. Such a judgment does not prevent a creditor from bringing or proving in an administration action. That follows from *Terrewest* v. *Featherby* (5), where Lord Eldon, in an administration action, refused to grant an injunction to restrain a creditor from obtaining such a judgment. If the judgment had been de bonis testatoris the injunction would have been granted.

[FARWELL L.J. referred to *In re Womersley.* (6)

(1) (1879) 4 App. Cas. 504.
(2) [1894] 1 I. R. 63.
(3) [1893] 2 Ch. 1.
(4) [1907] 2 K. B. 350, 365.
(5) (1817) 2 Mer. 480.
(6) (1885) 29 Ch. D. 557.

KENNEDY L.J. If the creditor chooses to take a judgment against the executor personally, how can the fiduciary relation continue ?]

The fiduciary relation may be with any person who is entitled to call on him to pay, not necessarily with the executor or plaintiff in the action in which the order to pay is made: *Marris* v. *Ingram*. (1) *Lee* v. *Park* (2) is another instance of the rule that execution on a judgment de bonis propriis will not be restrained even after a decree in an administration action, and in *Clarke* v. *Earl of Ormonde* (3) the rule is stated in the same way. It would be an extraordinary result if a creditor who recovers judgment against an executor de bonis propriis loses all right against the testator's estate. There can be no merger of the remedies. If the remedy against the estate is lost it must be by election or estoppel, and there is no ground for either.

Norton, K.C., in reply.

COZENS-HARDY M.R. This appeal raises an important and I think a novel point, and although for some reasons it might be desirable that we should postpone our judgment, I think, as we have all arrived at a clear conclusion upon one point which is sufficient to dispose of this appeal, it is expedient that we should at once say so.

The plaintiffs, who instituted this action on behalf of themselves and all other creditors of the testator, are admittedly creditors of the testator Henry Thomas. That is put beyond all doubt, because at an early stage of this action the Court made a full administration decree and directed that nothing should be done under the decree in the first instance, except to ascertain whether anything, and what, was due to the plaintiffs. That was ascertained by the Master's certificate, which was dated on April 5, 1911, and found that a sum of 2155*l.* 8*s.* 1*d.* was due to the plaintiffs for principal and interest. Subsequently a further inquiry as to other creditors was added, and although the certificate has not been actually made, it

(1) (1879) 13 Ch. D. 338. (2) (1836) 1 Keen, 714.
(3) (1821) Jac. 108, 124.

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has been stated, and I do not doubt correctly, that there are no other creditors of the testator, all the others having been satisfied; and I am confirmed in that view because, in the account which the executor himself has delivered in this estate, there is no suggestion of any other creditor. I proceed therefore to deal with this case on the footing that there is no other creditor entitled under this decree.

That certificate having been obtained, this order was taken by the plaintiffs in chambers on May 9: "Upon the application of the plaintiffs by summons and upon hearing counsel and the affidavit of service on the defendant, the order of the 13th February directing the inquiry and the Master's certificate having been read, it is ordered that the defendant do forthwith pay to the plaintiffs 2155*l.* 8*s.* 1*d.* by the Master's certificate certified to be due to him together with interest on 1638*l.* at 4 per cent. per annum from the 5th April, 1911, and further that their costs of this action be taxed by the taxing Master and paid by the defendant." So that there is a personal judgment against the defendant for principal and interest, and also for all the costs of the action.

Now that was made, I think, upon the statement that the defendant, who was the sole executor and also the residuary legatee under the will, had received assets which were sufficient to pay the debt, and that he was personally liable de bonis propriis, to use the old-fashioned language. It was a personal judgment against the executor differing in no respect from an action which might have been brought in the King's Bench Division by the plaintiffs as creditors against Thomas as an executor who had admitted assets in his hands. The plaintiffs now, after having obtained that order, say that the defendant is a trustee, and that in his fiduciary character as a trustee he is within the exception of the Debtors Act; and they therefore seek to obtain an order against him in that character and to follow it up by attachment. That is carried into effect by two subsequent orders, one on April 10, 1912: "It appearing that the defendant has in his hands as executor of the will of the testator the sum of 971*l.* 4*s.* 4*d.* it is ordered that the defendant do within four days after service of the order lodge the 971*l.* 4*s.* 4*d.* in Court as

directed." That sum is the balance appearing due on a sworn account of the executor in his affidavit. That order was not complied with, and on May 10, 1912, a subsequent order was made directing an attachment.

The great point to be considered is this. The plaintiffs get judgment against the defendant upon which they could issue execution, and they did issue execution, but there was a return of nulla bona. The defendant made himself bankrupt on his own petition immediately after the order for payment; the plaintiffs have proved in that bankruptcy. Under these circumstances is it competent for the plaintiffs to allege that the fiduciary relation which undoubtedly did originally exist between the defendant in his character of executor and themselves still exists, after the personal judgment, after the bankruptcy, and after the proof? It must be remembered that the jurisdiction under the Debtors Act for attachment is of a punitive character. It is not a process of execution at all, it is simply a statutory power or right to punish a man for that which the Court regards as, and which undoubtedly is, dishonesty—to punish him if he does not discharge the debt which is still due from him in the fiduciary capacity. Can it be said that the debt is so due in the present case? In my opinion it cannot. On the plaintiffs taking this personal judgment for the debt and interest and the costs of their action against the defendant, it seems to me that the fiduciary relation as between these parties came to an end. The plaintiffs have got against the defendant, they have elected to take, and they have taken a remedy which terminated the relation, for there is no fiduciary relation between a judgment creditor and a judgment debtor.

In that state of things, there being no authority directing us upon the point, I decline to say that the circumstances of this case are such that any order ought to have been made by the learned judge on the footing that this fiduciary relation continued towards the plaintiffs; still less that any order ought to have been made for attachment. We are not troubled here with the question of there being other creditors of the testator who might have had an interest in any moneys which might have got into Court under the order for payment. I desire to say nothing

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whatever as to what might have been the result if there had been other creditors who could have claimed the money when thus brought into Court; but the plaintiffs, being the only creditors, having got personal judgment against the defendant for principal and interest and costs of the action, cannot in my opinion invoke what is really the punitive jurisdiction of the Court, on the ground that that personal judgment still left untouched the fiduciary relation between the defendant and the plaintiffs. On that short ground I think that the two orders made by the Court below ought to be discharged and the appeal allowed.

FARWELL L.J. I am of the same opinion and for the same reasons. We are asked to exercise the jurisdiction under the Debtors Act, and it is important to see that the liberty of the subject is not interfered with unless it is quite clear that the Court has jurisdiction. I have no doubt, on the authority of the cases in this Court which have been referred to, that an executor is in a fiduciary relation to the testator's creditors. But the question here resolves itself into this. The respondents are the only creditors of the testator; they have dealt with themselves as the only creditors; although they took a full decree they had all the inquiries stayed except as to their own debt, they obtained a certificate as to this debt, and then got a personal order for the payment of it; and it is exactly as if they had sued the executor in person at common law and had got a judgment de bonis propriis. It is impossible for them now to fall back upon the former position of the debtor whom they have chosen to deal with as their personal debtor and say that he is executor, for the purpose of asking us to put in force the quasi-criminal jurisdiction.

I agree with the Master of the Rolls that we have no jurisdiction to make the order.

KENNEDY L.J. I am of the same opinion. This is a novel and I quite agree, after the interesting argument that we have heard, a difficult question which one has to decide for the first time, but I have come clearly to the same opinion as that which the Master of the Rolls and Farwell L.J. have expressed.

We have only to deal with one point. Is the relation between these parties such that, at the time of the application which was made to Joyce J., the punitive jurisdiction which can be exercised under the Debtors Act was applicable to the appellant? In other words, was he a person who was not a mere debtor but was in the position of a trustee or sued in some other fiduciary relation? In my opinion he was not. The position of the executor was originally, as has been already said, one which in regard to creditors such as the present respondents was the position of a trustee. As a trustee he could not be sued simply in respect of what is strictly speaking trust money, such as legacies or distributive shares payable out of the estate of the deceased. These could not, of course, be recovered in an action against him as debts; he could only be made liable at law in respect of such claims if he had in some form or other admitted that he had received the money and held it as the money of the cestui que trust. I assume that it is decided that as regards creditors also the executor might be treated as a trustee; but he ceased in my opinion to be a person who could be so treated by the present respondents, so far as regards the infliction of this punitive treatment, because they had taken the steps which have been already set out chronologically by the Master of the Rolls. They had chosen to say "There is a debt due to us. We the creditors sue you." They took proceedings and obtained the order and issued execution, and after that, after the relation had been created of a judgment creditor and a judgment debtor, I can find no authority for saying that the judgment creditor can at the same time say to the judgment debtor "You are a trustee for me of that money" or "You are in a fiduciary position in respect of that money. You have failed to pay, and, therefore, as you are in that fiduciary position, I can justly obtain from the Court against you the special treatment and punishment of a punitive nature to which only a person in that relation to me can be subjected." Directly the matter comes before the tribunal, it appears that the executor is not a person in the position of trustee, but is a person who is a judgment debtor, and a judgment debtor is not in any fiduciary relation to his creditor.

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For myself I think that these proceedings of a semi-criminal nature, with the serious consequences that may follow if the money is not obtained from somewhere, ought to be very carefully watched. There are Courts that are open in which people who are fraudulent can be dealt with after proper trial before a jury. This sort of proceeding is sought to be made available, I may add, in this particular case, not only against a person who is in the position of a judgment debtor, but against a person who is also a bankrupt and in whose bankruptcy the creditors have proved for their judgment debt, and I feel bound to look very carefully indeed to see whether the punitive law was applicable in a case where the debtor, against whom it is sought to enforce it, had, as the applicant's proof in the bankruptcy shews, been treated by the creditors themselves as a man who has no means to pay what he ought to pay. I think myself that there is no such relation existing as would in a case of this kind make it right that the jurisdiction should be applied.

COZENS-HARDY M.R. We discharge both orders, that of May 10, 1912, for attachment, and that of April 10, for payment into Court. The appellant must have the costs of the appeal. We make no order as to the costs below.

Solicitors: *Paterson, Candler & Sykes; Laytons.*

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In re KNOLLYS' TRUSTS.
SAUNDERS *v.* HASLAM.

[1912 K. 75.]

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Revenue—Increment Value Duty—Settled Land—Provisional Valuations—Duty to check Valuations for Protection of Estate—Owner—Tenant for Life—Trustees — Discretion — Remainderman — Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 27, *sub-ss.* 1, 2, 5.

Under a will certain property, consisting of freehold land divided into numerous plots on which houses had been built and now let on leases for long terms, stood limited to trustees upon trust for E. for life with remainder to S. in base fee. A number of provisional valuations had been made by the district surveyor under the Finance (1909-10) Act, 1910, for the purpose of assessing the increment value duty under the Act. S. applied to the trustees to take measures to check the provisional valuations and for that purpose to have valuations made. E. opposed this on the ground of expense. S. then applied to the Commissioners as a person interested under s. 27, sub-s. 5, of the Act that he might be supplied with copies of the provisional valuations, and this was promised. He then took out this summons for an order directing the trustees to have valuations made for the purpose of checking the valuations of the district surveyor. The only evidence in support of the application was an affidavit by a surveyor of standing and experience that the valuations under the Act were usually too low.

Neville J. held that on the true construction of the Act the duty of protecting the estate in the matter of these valuations was thrown on the owner (i.e., in the case of settled land, the tenant for life) and not on the trustees. Under s. 39 the trustees if they did interfere could charge their costs on the estate, but the Court would not direct the trustees to take proceedings except in a case where serious injury was threatened to the estate, and in this case there was no sufficient evidence of any such threatened injury.

Held, on appeal, that in the course of their ordinary duty trustees had to exercise their discretion in such cases; that the trustees in the present case had honestly exercised that discretion; and that there was no reason why the Court should interfere with it.

Decision of Neville J. affirmed.

UNDER the trusts of a voluntary settlement made by the will of John Weldale Knollys in September, 1866, in the events which had happened, certain real estate stood limited to trustees in trust for the settlor's daughter G. E. Ellis for her life with remainder to her nephew Edward Francis Saunders in tail. By an indenture dated April 23, 1902, E. F. Saunders barred his

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estate tail, but G. E. Ellis refused to concur in this deed as protector of the settlement, and therefore E. F. Saunders acquired only a base fee. The trustees had no powers of management under the settlement except during the infancy of a tenant in tail by purchase. They had a power of sale, but only at the request and by the direction of the tenant for life.

The property subject to the trusts of the settlement at the date of the summons consisted of (1.) a small piece of freehold land at Reading of about half an acre in extent not built upon or let; (2.) ground rents amounting to 2065*l.* 15*s.* a year reserved by thirty-seven separate leases of property in Reading; (3.) two perpetual yearly rent-charges, the one of 340*l.* and the other of 25*l.*, secured upon freehold property; (4.) stock investments of 1540*l.* The earliest date at which any of the leases would expire was Lady Day, 1977; the majority would not expire until after 1987.

About 275 provisional valuations had been, or were being, made by the district surveyor appointed under the Finance (1909-10) Act, 1910, for the purposes of the undeveloped land duty and increment value duty imposed by that Act. The remainderman desired that a valuation of the properties should be made for the purpose of checking these provisional valuations, serving objections, and inducing the district surveyor if necessary to alter the valuations. He applied to the trustees of the settlement to pay the legal and surveyor's expenses of so checking all the provisional valuations out of the capital funds subject to the trusts of the settlement. It was stated that the proposed surveyor's fees if the matter were settled without litigation would be 380 guineas. The tenant for life absolutely refused to consent to any such expenditure, and the trustees therefore told the remainderman that they could not pay the expenses asked for out of capital.

The remainderman then applied to the Commissioners under s. 27 of the Finance (1909-10) Act, 1910, to have copies of the provisional valuations served on him, and this was assented to. He then had certain valuations made, and took out this originating summons, against the trustees and the tenant for life, asking for an order that the trustees or the tenant for life should be directed to take the necessary steps for obtaining a valuation

of the settled hereditaments to check the provisional valuations made for the purpose of the Finance (1909–10) Act, 1910, and that the trustees or the tenant for life might be authorized to adopt the valuations already made on behalf of the plaintiff.

In support of the application the plaintiff produced an affidavit by a surveyor of standing, that in his own experience he had found that the Government valuers were putting low, and in some cases very low, values upon fully developed properties, and he had frequently succeeded in getting both site values and total values increased, thus diminishing the amount of increment duty to be paid when it became payable.

The sections of the Finance (1909-10) Act, 1910, on which the argument turned are set out in the note on p. 363, post.

The summons was heard before Neville J. on February 21, 1912.

Peterson, K.C., and *G. B. Hamilton*, for the summons. The applicant, who is entitled to a base fee in reversion expectant on the death of a tenant for life in this property, desires to have the provisional valuations, which have been made by the district surveyor under the Act, examined and tested for the protection of the estate. The tendency of the valuers under the Act is to put too low a value upon the land, and then the increment value duty is increased when it becomes payable.

[NEVILLE J. It is suggested that no increment value duty can become payable until the end of the leases, and that must be long after the death of the tenant for life.]

That is not so; increment value duty is payable upon the sale of any interest, and for this purpose a reversion expectant on a lease is an interest. Sect. 27, sub-s. 2, of the Act throws upon the owner the duty of protecting the estate in the matter of these valuations. In the present case the trustees appear to be the "owner" as defined by s. 41, but whether the owner be the trustees or the tenant for life, they are bound to protect the remainderman, and s. 39, sub-s. 1, enables the trustees to charge on the property any costs he may incur in so doing. The Court will direct the trustees to do their duty in the matter if they neglect it.

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Butcher, K.C., and *T. L. Wilkinson*, for the tenant for life. In this case there are only two people interested in the estate, the tenant for life and the remainderman. They are both sui juris, and s. 27, sub-s. 5, of the Act gives the remainderman power to protect himself, and he has availed himself of that power. The tenant for life is willing that a valuation should be made of the piece of land not built upon, for that may be sold at any time. But as to the ground rents reversion duty cannot become due in respect of them until the leases expire. Increment value duty cannot become payable until the same time, unless the reversion is sold before it falls into possession, and that is most improbable. The application ought to be treated on the same lines as an application for leave to take proceedings for the benefit of a settled estate under the Settled Land Act, 1882, s. 36. That leave is only granted when there is a special danger threatening the estate: *In re Yorke* (1); *In re Beddoe.* (2) Here the evidence of danger is of a very shadowy nature. The surveyor who makes the affidavit has only seen two of the valuations, and the Court is asked to act on an assumption that as a general principle the Government valuers are probably wrong.

J. Henderson, for the trustees.

Peterson, K.C., in reply.

NEVILLE J. I do not think I ought to make the order asked for in this case. I confess that it is a matter of some difficulty. By s. 27, sub-ss. 1 and 2, of the Finance (1909-10) Act, 1910, the owner is indicated as the person on whom the duty is thrown of protecting the property in the matter of these valuations. If he neglects that duty s. 27, sub-s. 5, gives any person interested power to protect himself. Apparently, if the trustees should interfere, s. 39 gives them the power to charge their costs upon the estate. But I do not think it was intended by the Act that any duty should be thrown on the trustees to protect the estate in this matter. The effect of the definition of "owner" in s. 41 combined with s. 27, sub-ss. 1 and 2, is that the tenant for life is made responsible for this purpose, and it would be inconsistent to saddle the trustees with the same duty. In certain cases

(1) [1911]1 Ch. 370. (2) [1893] 1 Ch. 547, 562.

where serious injury is threatened to the estate, it might be right for the Court to direct the trustees to take some action. But the Court ought not to force this duty upon them in all cases as if it had been specially committed to their charge. In the present case there is not sufficient evidence before me that any such serious injury is threatened. It is admitted that the valuations of one piece of land, which is undeveloped building land, ought to be checked, and I do not think it necessary to give any directions as to the rest of the property. The application was not, however, unreasonable and has not been altogether fruitless. The trustees, therefore, may raise and pay the costs of all parties out of the estate.

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E. F. Saunders appealed. The appeal was heard on June 22, 1912.

Peterson, K.C., and *G. B. Hamilton*, for the appellant. It is the duty of trustees to do all they can to protect the property of which they are trustees, and it is therefore their duty to check the provisional valuations, although no such duty is specially cast upon them by the Act. The learned judge was wrong in holding that for the purposes of s. 27 the tenant for life was the owner; the trustees are the owners, and the duty is on them. By s. 41 the owner of property let on a long lease is the lessee; and by s. 27, sub-s. 7, in that case the "person entitled to the fee simple reversion" is to be treated as the owner as well as the lessee. Therefore the trustees, who are entitled to the reversion, are owners for the purposes of s. 27. It is true that most of the loss will probably fall on us, but in case of a sale the whole estate will be affected.

Butcher, K.C., and *T. L. Wilkinson*, for the tenant for life, and *J. Henderson*, for the trustees, were not called upon to argue.

COZENS-HARDY M.R. This is an appeal from Neville J. and the application was obviously framed to support the very wide proposition that it is the duty of trustees to interfere in all these cases. The legal estate is in trustees; there are an equitable tenant for life and a remainderman who is entitled to a base fee.

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The property is extensive, let as a large number of separate leasehold properties, held for long leases, falling in at the end of the century, and there is some undeveloped land.

The application was made by the owner of the base fee that the trustees of the estate should take proceedings at the expense of the estate to check the provisional valuations which had been made by the Government surveyors under the Finance (1909-10) Act, 1910. That would cause an expenditure of about 380*l.*, and of course it involves a very wide and important question. The trustees are here, and they say that in the exercise of their discretion they do not think it desirable to interfere and check these valuations. The only question is whether there is any ground for our interfering with that which is an honest exercise of their discretion. I think there is none. If the remainderman were helpless in the matter, there would be more to be said for his application, but he is not. He is under s. 27, sub-s. 5, a "person interested in the land," and may take such proceedings as he thinks fit to get the valuations reviewed, and in fact take the steps which he has taken. He is prima facie the person who and who alone is interested in raising this question and obtaining higher valuations of the property; although it is true that if the property is sold in the lifetime of the tenant for life the fact that the provisional valuations were too low might affect the corpus of the trust estate. I see no ground for directing the trustees to do what they do not desire to do where the applicant has full power to check the valuations himself.

I should be sorry to have it supposed that there may not be circumstances in which trustees may have to apply to the Court for directions on such a point. The circumstances may be such as to justify the expenditure, even though there is nothing about the duty of trustees in the Act. I only say this to shew that my view does not negative a duty upon trustees in certain circumstances to apply to the Court for leave to check the valuations. In the present case there are no special circumstances, except as to the vacant land as to which it was agreed that there should be this checking on behalf of the trustees. I should like to add that I do not mean to decide that trustees cannot take steps to check the provisional valuations

without applying to the Court for directions. The appeal must be dismissed.

FARWELL L.J. I am of the same opinion. We are invited to consider two propositions. The first proposition is this, that on all Government valuations it is the duty of trustees to take steps to check them. That involves the assertion that the Government surveyors are not trustworthy, and it is impossible for us to adopt such an assertion without evidence. The second proposition is that the question depends on the particular facts of the case. If so it depends on the manner in which the trustees exercise their discretion, and I see no reason on the evidence before us for interfering with the way in which these trustees have exercised it. There are no infants concerned. There is nothing left for the Court to consider except the particular limitations of the property. Here the tenant for life does not desire to take any steps, but the remainderman does. Under s. 27, sub-s. 5, he can take these steps himself if he likes, and we ought not to impose such a duty upon the trustees against the will of the tenant for life.

KENNEDY L.J. I agree. I think Neville J. rightly refused to interfere with the trustees' discretion.

Appeal dismissed.

Solicitors: *Burnie & Co.; Greenfield & Herbert Mason.*

NOTE.—"27.—(1.) The Commissioners shall cause a copy of their provisional valuation of any land to be served on the owner of the land, and, unless objection is taken to the provisional valuation in manner provided by this section, the values shown in the provisional valuation shall be adopted as the original total value and the original site value respectively for the purposes of this Part of this Act.

"(2.) If the owner considers that the total or site value, as stated in any provisional valuation, is not correct, he may, with a view to an amendment of the provisional valuation, within sixty days of the date on which the copy of the provisional valuation is served, or such extended time as the Commissioners may in any special case allow, give to the Commissioners notice of objection to the provisional valuation, stating the grounds of his objection and the amendment he desires, and, if the Commissioners amend

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the provisional valuation so as to be satisfactory to all persons making objections, the total and site value as stated in the amended valuation shall be adopted as the original total and the original site value for the purposes of this Part of this Act.

"(3.) The Commissioners may amend any provisional valuation, whether objected to or not, before it is finally settled, and the amended provisional valuation shall be deemed to be a provisional valuation for the purposes of this section.

"(4.) If the provisional valuation is not amended by the Commissioners so as to be satisfactory to any objector, that objector may give a notice of appeal under this Act with respect to the valuation, but, if no such notice is given, the total and site value as stated in the provisional valuation, subject to such amendments as may be made by the Commissioners in order to meet objections, shall be adopted as the original total and the original site value respectively for the purposes of this Part of this Act.

"(5.) Any person interested in the land, not being an owner, may apply to the Commissioners for a copy of the provisional valuation of the land before it is finally settled, and shall then have the same right of giving notice of objection and of appealing as the owner."

"(7.) Where a lessee is the owner of the land within the meaning of this Act, this section shall apply as if any person entitled to the fee simple reversion or to a leasehold reversion for a term of years exceeding twenty-one were the owner as well as the lessee."

"39.—(1.) Where the fee simple of any land, or any interest in land, in respect of which increment value duty or reversion duty is charged, is settled land within the meaning of the Settled Land Act, 1882, or is vested in a trustee, and the tenant for life, or persons having the powers of a tenant for life, or the trustee, is the person who is liable to pay any sums on account of either of these duties, he shall be entitled to charge by deed upon the land or interest in land any amount paid by him, or which he may then be or may thereafter become liable to pay, in respect of either of these duties, and the amount of any expenditure which he may have reasonably incurred in connection with the valuation, and the benefit of any such charge, may be transferred in like manner as a mortgage."

"41. In this Part of this Act unless the context otherwise requires—

"The expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold, except that where land is let on lease for a term of which more than fifty years are unexpired, the lessee under the lease or if there are two or more such leases the lessee under the last created under-lease shall be deemed to be the owner instead of the person entitled to the rents and profits as aforesaid."

H. C. R.

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June 12.

In re SEARLE.
RYDER *v.* BOND.

[1912 S. 1076.]

Lunacy—Person of Unsound Mind not so found by Inquisition—Receiver—Lease—Order of Master — Purchase of Freehold Reversion — Merger — Devolution—Rights of Heir and Next of Kin.

By an order made by a Master in Lunacy, in the matter of a person of unsound mind not so found by inquisition, a receiver of the lunatic's estate was given liberty, on behalf of the lunatic, to purchase the reversion in fee of leasehold hereditaments (held for a term which by effluxion of time would expire in 1929) in consideration of the payment of a perpetual yearly rent-charge, and it was ordered that the lease (which was vested in a trustee for the lunatic for life, remainder for one for life who predeceased the lunatic, remainder for the lunatic absolutely) might be delivered up to be cancelled.

By an indenture, which was settled by the Master, and bore the seal of the Lunacy Office, and was executed by the receiver on behalf of the lunatic, the hereditaments were granted, subject to the yearly rent-charge to issue thereout, to the use of the trustee (in whom the lease was vested) as purchaser in fee simple.

On the death of the lunatic a question arose whether the leasehold hereditaments had been "converted into real estate" and passed to the heir, or whether they went to the next of kin, the order being silent as to preserving the rights of next of kin:—

Held, that the leasehold term had merged in the freehold reversion, and the hereditaments, being in fact freehold at the death of the lunatic, passed to her heir.

ADJOURNED SUMMONS.

Under the will of Thomas Searle, who died in 1898, a leasehold messuage and premises, 33, Union Street, Torquay, were vested in a trustee upon trust (in the events which happened) for Irene Dorothea Searle for life, and after her death for Jane Ryder, and after her death for Irene Dorothea Searle absolutely.

By an order in Lunacy dated April 30, 1902, the plaintiff was appointed under s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890, receiver of the estate of Irene Dorothea Searle, then a person of unsound mind not so found by inquisition.

By another order, dated January 9, 1903, it was ordered by the Master that the receiver "be at liberty in the name and on the behalf of the said Irene Dorothea Searle to purchase the reversion in fee of No. 33 Union Street Torquay aforesaid upon the payment

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of a perpetual yearly rent-charge of 13*l.* 10*s.* accruing as from Michaelmas 1901 and that the present lease" (which was for a term of ninety-nine years from September 29, 1830) "may be delivered up to be cancelled."

By an indenture dated March 20, 1903, which recited that the owners of the freehold reversion expectant on the determination of the leasehold term had agreed with the trustee in whom the term was vested for the sale to him in consideration of a perpetual yearly rent-charge of 13*l.* 10*s.* of the hereditaments 33, Union Street for an estate in fee simple, and also recited the order of January 9, 1903, and that T. H. Fischer, Esq., K.C., one of the Masters in Lunacy, had settled those presents, in testimony whereof the seal of the Masters in Lunacy had been affixed in the margin, and that Irene Dorothea Searle acting by the receiver had in pursuance of the order agreed to join in those presents, it was witnessed that in consideration of the yearly rent-charge of 13*l.* 10*s.* thereinafter limited the reversioners appointed that the hereditaments 33, Union Street should stand limited (subject to the lease and the term thereby created, but to the intent that the same and the unexpired residue of the term might merge and be extinguished) to the uses thereinafter limited, and they thereby granted the hereditaments to the purchaser in fee simple to the uses thereinafter limited, and it was declared that the appointment and grant should enure to the use that the reversioners might receive a perpetual rent-charge of 13*l.* 10*s.* per annum commencing from September 29, 1901, charged upon and issuing out of the hereditaments, and subject and charged as aforesaid to the use of the purchaser in fee simple.

The indenture was settled by the Master and bore the seal of the Lunacy Office, and was executed by the receiver on behalf of the lunatic.

Jane Ryder died on March 8, 1905. The lunatic died on November 2, 1911, intestate and unmarried.

The order of January 9, 1903, being silent as to preserving the rights of next of kin, and a question having arisen whether the order operated so as to effect a conversion of the leasehold hereditaments into freehold, and whether they passed to the heir of the lunatic or to the next of kin, the plaintiff, to whom letters of

administration of the estate of the lunatic were granted and who claimed to be her heir-at-law, took out this summons, making two of the next of kin defendants, for the determination of the question whether the hereditaments were "duly converted into real estate" during the life of the lunatic and passed to the plaintiff as her heir-at-law.

Whitmore Richards, for the plaintiff. The conveyance, settled by the Master in Lunacy, effected a conversion of the leasehold into realty out and out. The Master in Lunacy has power to effect conversion. *Hartley* v. *Pendarves* (1) shews that clearly.

[JOYCE J. The Lords Justices have power to convert personalty to realty and realty to personalty. Can the quasi-receiver with the sanction of the Master do the same?]

The principle is stated in *Attorney-General* v. *Marquis of Ailesbury* (2) by Lord Macnaghten. The paramount consideration is the interest of the lunatic.

[JOYCE J. It is the practice of the Court to preserve the rights of the next of kin, but is it bound to preserve them?]

The purchased freehold and the leasehold merged. On the lunatic's death the property must be taken in the state in which it is then found to be; the heir, therefore, takes it as being freehold.

[JOYCE J. What is the power of the Court as to expending a lunatic's money in purchase of land?]

Attorney-General v. *Marquis of Ailesbury* (2) answers the question.

[*Cozens-Hardy* said the proposition on behalf of the next of kin would be that the Court had no general power to purchase land with the lunatic's money. It could do it for certain special purposes or in special circumstances, as in administration or otherwise. But beyond that it had no power.]

[JOYCE J. I take the Master's order to be of the same effect as a direction of the Court in the case of a lunatic so found by inquisition.]

The lease being gone, at the death of the lunatic the property was freehold and the heir takes it as he finds it.

(1) [1901] 2 Ch. 498. (2) (1887) 12 App. Cas. 672, 688, 689.

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[JOYCE J. referred to Lord Halsbury's Laws of England, vol. xix., "Lunatics," pp. 449, 450, and to Heywood and Massey's Lunacy Practice, 4th ed. pp. 184, 185.]

The orders sanctioning purchase are usually made in the Lunacy Office. In the case of a lunatic so found all the powers exist which would exist if the lunatic were not so found. In *Attorney-General* v. *Marquis of Ailesbury* (1) it is pointed out that the Lords Justices can do anything that is for the benefit of the lunatic. They can earmark the property, but if they do not it must be taken as it is found. There are no equities between the heir and the next of kin.

Cozens-Hardy, for the next of kin. Prima facie there is no power to purchase land on behalf of the lunatic. The origin of the matter goes back to the statute De Prerogativa Regis. In *Attorney-General* v. *Marquis of Ailesbury* (2) Lord Macnaghten says it is no new doctrine that, if possible, the Court will not alter the character of the lunatic's property or interfere with any rights of succession. The committee of a lunatic has no power of himself to lay out the lunatic's personal estate in land. If the Court considers it expedient to purchase, it will not alter the devolution of the property, or the rights of the lunatic if he recovers: *In re Badcock.* (3) The devolution will not be altered unless the Court decides to alter it, whether in the case of a lunatic so found by inquisition or of a lunatic not so found.

[JOYCE J. The question is whether, there being no provisions about devolution in the order, I can insert them.]

That is so. There is no authority on the point, and the statutes do not touch it. There may be merger of the legal, but there is not of the equitable, estate. The beneficial interests are not affected. The case is just the same as if a sum of money, say 500*l.*, had been paid out of the lunatic's estate to purchase the property. The case of money paid for the enfranchisement of copyholds into freeholds would be analogous. The next of kin have, in such case, the same rights as they had before the transaction. Where an order is made without expressly reserving the rights, the rights are not taken away.

(1) 12 App. Cas. 680. (2) 12 App. Cas. 691, 692.
(3) (1840) 4 My. & Cr. 440

JOYCE J. The summons asks "whether a certain leasehold messuage and hereditaments known as 33 Union Street Torquay whereof the said Irene Dorothea Searle became entitled on the death of Thomas Searle (who died on March 26 1898) subject to certain life estates (which have determined) was duly converted into real estate during the life of the said Irene Dorothea Searle and passes to the plaintiff as heir-at-law." The real question is not very happily expressed. The facts of the case are something like this. Under the will of Thomas Searle a leasehold messuage was vested in a trustee, upon trust for the lunatic Irene Dorothea Searle for her life, with remainder for Jane Ryder for life, with a remainder which was, in effect, for the lunatic absolutely. What the rent was I do not know. During the existence of the lunacy the quasi-receiver appointed under s. 116 of the Lunacy Act, 1890, in the course of his management of the lunatic's estate, and with the express sanction of the Master in Lunacy, entered into an arrangement with the owners of the freehold reversion that the lease should be surrendered so as to merge in the freehold reversion, and that the reversion and the lease which had so merged should be held by the trustee of the will of Thomas Searle and be subject to a perpetual rent-charge.

Such an arrangement could, clearly, have been made by the committee of a lunatic so found by inquisition with the sanction of the Lords Justices, and it could equally, I think, be made by the quasi-receiver of the lunatic with the sanction of the Master. Looking at the order of January 9, 1903, there is express liberty given to the quasi-receiver on behalf of the lunatic to purchase the reversion in fee of 33, Union Street upon the payment of a perpetual rent-charge of 13*l.* 10*s.*, and it was ordered that the present lease might be cancelled. Further, the indenture of conveyance was settled and approved by the Master in Lunacy, and the seal of the Master was affixed in the margin thereof.

I find in Heywood and Massey's Lunacy Practice, 4th ed. pp. 184, 185, under the head "As to the purchase of real estate on behalf of a lunatic," this statement: "The Masters have jurisdiction, under the sections of the Lunacy Act, 1890, dealing with management and administration, to sanction the purchase

JOYCE J. 1912 SEARLE, *In re.* RYDER *v.* BOND.

of real estate on behalf of a lunatic. But such sanction will only be granted under special circumstances, e.g., when it is desirable to purchase a house for the lunatic's residence, or a piece of land is required to round off an estate"—the present case seems to me to be analogous to that—"and complete a series of transactions commenced by the patient when sane. A satisfactory title to the real estate must be shown. There is no conveyancing counsel to the Lunacy Office: but the Masters generally direct that counsel shall advise both on the contract for purchase and the abstract of title. The order for purchase is drawn so as to protect the interests of persons who may be entitled on the death of the patient to share in his estate and to preclude any advantage to the heir-at-law at the expense of the next of kin. The conveyance will be to the committee or receiver *in trust for* the lunatic, *his heirs, executors, administrators, or assigns, regard being had to the source from which the purchase-money was derived.*" Although that is the rule it is within the power of the Court, in Lunacy, to alter the nature and consequent devolution of the estate of the lunatic. In the present case the order says nothing as to preserving the rights of the next of kin, the reason of which may very probably be that it was not considered worth while to preserve them. It was thought to be for the benefit of the lunatic's estate that the lease should be surrendered in exchange for a conveyance of the premises in fee subject to the payment of a perpetual rent-charge. The Court had power to make such an order, and I do not propose to say that the order in this case was not properly made. The Master who made the order knew what he was doing, and I think I must give effect to it. I do not say that the leasehold was "converted"—which is the word used in the summons—but I hold that the lease merged in the freehold reversion, and the premises 33, Union Street, which were in fact freehold at the death of the lunatic, passed as such to her heir.

Solicitors: *Crowders, Vizard, Oldham & Co., for Windeatt & Windeatt, Totnes.*

A. L.

LUBY *v.* WARWICKSHIRE MINERS' ASSOCIATION.

NEVILLE J.

1912

June 5, 6; *July* 2.

[1912 L. 203.]

Trade Union—Rules—Expulsion of Member—Ultra vires—Injunction—Illegal Association—Branches—Delegates—Trade Union Act, 1871 (34 & 35 *Vict.* c. 31), *ss.* 4, 8, 16—*Trade Union Act Amendment Act*, 1876 (39 & 40 *Vict.* c. 22), *ss.* 3, 4—*Trade Disputes Act*, 1906 (6 *Edw.* 7, c. 47), *s.* 5, *sub-s.* 2—*Unlawful Societies Act*, 1799 (39 *Geo.* 3, c. 79), *s.* 2—*Seditious Meetings Act*, 1817 (57 *Geo.* 3, c. 19), *s.* 25—*Friendly Societies Act*, 1896 (59 & 60 *Vict.* c. 25), *s.* 32.

The Act 39 Geo. 3, c. 79, after prohibiting certain societies, enacts (s. 2) that every society composed of different divisions or branches acting in any way separately or distinct from each other and having separate or distinct officials shall be deemed to be an unlawful combination or confederacy; and the Act 57 Geo. 3, c. 19, after prohibiting certain societies, enacts (s. 25) that every society which nominates or appoints delegates to meet and confer with any other society, or with any delegate of such other society, shall be deemed to be an unlawful combination or confederacy:—

Held, that although modern trade unions having branches and appointing delegates came within the scope of the said Acts of George III., and were not expressly exempted from those Acts by any subsequent Act, their existence had been recognized by the Legislature in the Acts relating to trade unions, and they must be deemed to be impliedly exempt from the provisions of the said Acts of George III.

The defendant association was registered under the Trade Union Acts, 1871 and 1876, and consisted of numerous lodges or branches. Each lodge elected its own officials and managed its own affairs and appointed delegates to meet and confer with delegates of kindred societies. The plaintiff alleged that he was a member of the association, that a resolution of its council purporting to expel him was ultra vires, and claimed an injunction to restrain the association and its officials from acting on the resolution. The association denied that the plaintiff was a member, and alleged that it had power under its rules to pass the resolution, which was valid; and also pleaded that it was an unlawful combination and confederacy within the meaning of the said Acts of George III.:—

Held, that the plaintiff was a member of the association, that the resolution was ultra vires, and that the association was exempt from the provisions of the Acts of George III.

An injunction was accordingly granted.

WITNESS ACTION.

This was an action to obtain a declaration that the plaintiff was a member of the defendant association under these circumstances.

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The defendant association was formed in the year 1885 and was duly registered with rules under the Trade Union Acts, 1871 and 1876.

Rule 5 provided that the association should be composed of persons employed in and about the mines in Warwickshire, and such workmen engaged in kindred industries as the council might agree to accept, and might be divided into any number of distinct lodges.

Rules 27 to 33, both inclusive, provided for the management of local lodges.

Rule 58 provided that "The council shall have power to make by-laws, but not to infringe on the present constitution," and that disputes between members of the society should be dealt with by the council, whose decision should be final and binding in all cases.

Rule 63. "In all cases of importance, whether general or local, touching the conduct of officers, or any other question that may arise seriously affecting the interests of the members, before finally agreed upon, a vote by ballot shall be taken of the members throughout the association, and registered in the lodge books, when a majority of the votes of the members present shall be decisive and binding upon all the members of the association, except in the case of strikes, when two thirds of a majority (*sic*) shall be required."

The plaintiff was a check-weighman at the Kingsbury Colliery in Warwickshire, and from June to August, 1909, was a member of the Kingsbury lodge or branch of the association, and then ceased to be a member. About October 1, 1910, the plaintiff wished to rejoin the association, and through Smith, the secretary of the check-weighmen's committee, paid Spooner, the then secretary of the Kingsbury lodge, his entrance fee and subsequently four weekly contributions, and on October 29, 1910, received from Spooner his card of membership. Spooner, as the authorized secretary of the Kingsbury lodge of the association, had power to accept all persons working in and about the collieries attached to his lodge as members of the association on payment of their entrance fee and contributions. On November 16, 1910, the association through Spooner returned to the plaintiff

the amount of his entrance fee and contributions, and after some correspondence this action was commenced.

The plaintiff by his statement of claim alleged that the rules of the association contained no provision for the expulsion of members; alternatively, that if the association had power to expel its members, such power was only derived from and could only be exercised in accordance with rule 63, which had not been observed. He further alleged that in November, 1910, the executive committee of the association by a resolution or decision wrongfully purported to expel him from the association; that he had done nothing which entitled the association either under its constitution or its rules to expel him; that no notice was sent him of any charge or complaint against him, nor was any opportunity given him of shewing cause why he should not be expelled from the association; that his attempted expulsion was contrary to natural justice and the said resolution or decision was ultra vires and void; and he claimed (1.) a declaration that he was and had at all times since October 1, 1910, been a member of the association, (2.) a declaration that the resolution of the executive committee of the association whereby it was resolved to expel him from the association was ultra vires and void, and (3.) an injunction to restrain the association and its officers from acting upon or enforcing the resolution and from excluding him from such membership.

The association by its defence denied that the plaintiff was a member of the association. It did not admit that the power to expel was only to be exercised under rule 63. It relied on rule 58, and stated that on March 31, 1910, the council of the association passed a resolution that "The questions of taking action against persons who had not acted straight to the association were left in the hands of the solicitors and the executive committee," and that this resolution constituted a by-law under that rule. It admitted that in November, 1910, its executive committee, in exercise of the power vested in it by the aforesaid by-law, resolved that the plaintiff was not a fit and proper person to be or become a member of the association, and alleged that such last-mentioned resolution was not wrongful and that in pursuance thereof the executive committee returned to the plaintiff his entrance fee and

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contributions and refused to allow him to be or become a member of the association; and it alleged that the plaintiff had not acted straight to the association within the meaning of the aforesaid by-law in that (1.) he had wrongfully retained books and papers of the association and only delivered them up under a threat of legal proceedings, and (2.) he had between September, 1909, and April, 1911, used extremely discourteous and improper language in regard to the officials of the association, but that the association was prepared to reconsider the question of the plaintiff's admission to membership if he would apologize for the acts complained of, which he refused to do. The association further pleaded that it was an unlawful combination and confederacy within the meaning of the Act 39 Geo. 3, c. 79 (1), and also within the meaning of the Act 57 Geo. 3, c. 19. (2)

(1) The Act 39 Geo. 3, c. 79, after reciting the existence of five societies whose members took secret oaths and that such societies were composed of different branches and that it was expedient that such societies and all societies of a similar nature should be suppressed, enacts, s. 2, that all the said societies and also every other society whose members should take any unlawful oath within the meaning of the Act 37 Geo. 3, c. 123, ... "and every society which shall be composed of different divisions or branches, or of different parts, acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, secretary, treasurer, delegate or other officer, elected or appointed by or for such part . . . . shall be deemed and taken to be unlawful combinations and confederacies; and every person who, from and after the passing of this Act, shall . . . . directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee or other select body, president, treasurer, secretary, delegate or other officer, or member thereof as such, or who shall, by contribution of money or otherwise, aid, abet, or support such society, or any members or officers thereof as such; shall be deemed guilty of an unlawful combination and confederacy."

(2) The Act 57 Geo. 3, c. 19, s. 25 (as amended by the Statute Law Revision Acts, 1873 and 1890), enacts that societies or clubs taking unlawful oaths within the meaning of the Act 37 Geo. 3, c. 123, or requiring tests not authorized by law, "and every society or club that shall elect, appoint, nominate or employ any committee, delegate or delegates, representative or representatives, missionary or missionaries, to meet, confer or communicate with any other society or club, or with any committee, delegate or delegates, representative or representatives, missionary or missionaries, of such other society or club, or to induce or persuade any person or persons, to become members thereof, shall be deemed and taken to be unlawful

It appeared from the evidence that the association consisted of twenty-three distinct lodges or branches distributed over the Warwickshire coalfields; that each lodge acted separately or distinct from the other and had a separate president, secretary, treasurer, and other officials, and managed its own funds, and after payment of working expenses sent on its balance to the central office; that each lodge elected annually a delegate to serve on the council of the association, which consisted of one duly elected representative from each of the twenty-three lodges; and that delegates were also appointed to attend the Trade Union Congress, the Labour Council, and other kindred societies who met and transacted business with other delegates. The council was the supreme governing body of the association, of which Mr. Spare was the general treasurer and Mr. Johnson was the general secretary.

Spencer Bower, K.C., and *Stuart Bevan*, for the plaintiff. On the proper construction of the rules the plaintiff became a member on payment of his entrance fee and subscription and receipt of his card, and there is no power at all in the rules to expel a member, and no inherent power at common law, and his attempted expulsion is contrary to the rules of natural justice: *Dawkins* v. *Antrobus*. (1) Rule 63, if it applies, has not been observed; and rule 58 does not help them, for it only applies to

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combinations and confederacies within the meaning of the Act 39 Geo. 3, c. 79, and shall and may be prosecuted, proceeded against and punished according to the provisions of the said Act; and every person who shall become a member of any such society or club, or who shall act as a member thereof, and every person who shall directly or indirectly maintain correspondence or intercourse with any such society or club, or with any committee or delegate, representative or missionary, or with any officer or member thereof, as such, or who shall, by contribution of money or otherwise, aid, abet or support such society or club, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy within the intent and meaning of the said Act 39 Geo. 3, c. 79; and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said Act, with regard to the prosecution and punishment of unlawful combinations and confederacies."

(1) (1881) 17 Ch. D. 615, 620, 621.

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disputes between members, and this is not such a dispute. It was not open to the council to make a by-law for expulsion. Moreover, "not acting straight" means acting dishonestly, and that is not alleged; the reasons pleaded are trivial. Then it is suggested that the plaintiff is not entitled to relief because the association is an unlawful combination within the meaning of the two Acts of George III. But it is submitted that those Acts are obsolete or have fallen into disuse. The recitals shew that they were passed to suppress certain treasonable and seditious societies, and the general language of the sections relied on must be construed as referring to societies of a like nature. The Court will not apply a construction that would lead to manifest absurdity and palpable injustice: Maxwell on the Interpretation of the Statutes, 3rd ed. p. 319; *The India*. (1) The legality of trade unions and their branches is recognized by the Trade Union Act, 1871, ss. 4, 8, and 16, the Trade Union Act, 1876, ss. 3 and 4, and the Trade Disputes Act, 1906, s. 5, sub-s. 2. It is submitted that the Acts of George III. are impliedly repealed, at any rate so far as trade unions are concerned.

Peterson, K.C., and *Manning*, for the defendant association. It is a case of refusal to admit to membership and not of expulsion.

[NEVILLE J. When a man pays his entrance fee and is given a card of membership why is he not a member?]

On the evidence the admittance was conditional. Spooner was aware there had been friction between the plaintiff and the council and applied to the central office for instructions.

[NEVILLE J. Spooner had authority to admit to membership and did so. It was too late afterwards to raise the question.]

That raises the question whether the expulsion was legal. This is a voluntary association and they object to have as a member a man with whom they are at variance. It is submitted that the expulsion was not illegal. It is said that the two Acts of George III. are obsolete and do not apply to trade unions. But both Acts have been considered by subsequent legislation, and it is manifest that if trade unions had existed at the time the Acts were passed they would clearly have come within the prohibited

(1) (1864) 33 L. J. (P. M. & A.) 193.

societies. In the first place, the Act 39 Geo. 3, c. 79, after reciting that certain societies having branches and delegates "and all societies of the like nature" ought to be suppressed, by s. 1 prohibits the named societies; and then s. 2 enacts that "every society that shall be composed of different branches," &c., shall be deemed an unlawful combination and confederacy, and it is clear that all kinds of innocuous societies are within the mischief of the Act, because by ss. 5—7 Freemasons are exempted. Then s. 4 is repealed by the Statute Law Revision Act, 1871; ss. 8 and 9 are repealed by the Summary Jurisdiction Act, 1884; s. 11 is in part repealed by the Statute Law Revision Act, 1871; ss. 15 to 36 are repealed by the Newspapers, &c., Act, 1869; s. 37 is in part repealed by the Public Authorities Protection Act, 1893; s. 38 is repealed in part by the Statute Law Revision Act, 1887, and in part by the Summary Jurisdiction Act, 1884; s. 39 is repealed by the Statute Law Revision Act, 1871; and the schedules are repealed in part by the Summary Jurisdiction Act, 1884, and in part by the Statute Law Revision Act, 1887. Then the Act 57 Geo. 3, c. 19, has also been dealt with: ss. 1 to 22 are repealed by the Statute Law Revision Act, 1873; s. 23 is repealed in part by the Statute Law Revision Act, 1873, and in part by the Statute Law Revision Act, 1890; s. 24 is repealed by the Statute Law Revision Act, 1890; s. 25, as modified and amended by the Statute Law Revision Act, 1890, refers to the Act 39 Geo. 3, c. 79, and enacts that every society that employs delegates, &c., shall be deemed to be an unlawful combination and confederacy within that Act; ss. 26 and 27 exempts Freemasons and Quakers; s. 28 is not repealed; s. 29 is in part repealed by the Statute Law Revision Act, 1890; s. 30 is repealed in part by the Summary Jurisdiction Act, 1884, and in part by the Statute Law Revision Act, 1890; s. 31 is in part repealed by the Statute Law Revision Act, 1890; ss. 32 and 33 are repealed by the Public Authorities Protection Act, 1893; s. 34 is in part repealed by the Statute Law Revision Act, 1887; s. 36 is in part repealed by the Statute Law Revision Act, 1873; s. 37 is not repealed and empowers the Attorney-General to stay proceedings under the Acts; s. 38 is repealed by 7 & 8 Geo. 4, c. 27; s. 40 and the schedules are repealed by the Statute Law

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Revision Act, 1873. Further, that both Acts are not obsolete is shewn by the Short Titles Act, 1892, which gives to the Act 39 Geo. 3, c. 79, the title of Unlawful Societies Act, 1799, and to the Act 57 Geo. 3, c. 19, the title of Seditious Meetings Act, 1817. Lastly, friendly societies are by s. 32 of the Friendly Societies Act, 1896, expressly exempted from the two Acts of George III. It follows that both these Acts are still operative and that a trade union which is composed of branches and employs delegates is a society that is struck at by the Acts. There is nothing in the Trade Union Acts that authorizes the election of separate officials or the appointment of delegates. The defendant association therefore is an unlawful combination, and no one can assert a right to be a member of an illegal society.

Spencer Bower, K.C., in reply, on the interpretation of statutes, cited *Reg.* v. *Vasey*. (1) The Acts of George III. did not contemplate trade unions, which are the creatures of recent legislation.

[NEVILLE J. Is there any reported trade union case in which there was evidence that the union had branches and appointed delegates to meet the delegates of other societies ?]

In *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (2) and *Smithies* v. *National Association of Operative Plasterers* (3) the union had branches, but the point now before the Court was not raised.

Peterson, K.C., on the cases last cited.

Cur. adv. vult.

July 2. NEVILLE J. In my opinion the plaintiff upon the acceptance of his entrance fee and contributions and the receipt of a card became a member of the association. It appears to me that Mr. Spooner, the secretary of the Kingsbury lodge, had authority to admit to membership, and I find that the payments made by Smith on account of and by the direction of the plaintiff were received without condition. I think that Mr. Spooner did subsequently inquire of Mr. Spare whether he was in duty bound to receive the plaintiff's contributions, but in my opinion he

(1) [1905] 2 K. B. 748. (2) [1906] A. C. 384.
(3) [1909] 1 K. B. 310.

had already been admitted by Mr. Spooner in exercise of his authority. There had been, undoubtedly, differences between the plaintiff and Messrs. Spare and Johnson, the general treasurer and secretary of the association, which I think are immaterial to the questions I have to determine. On or about November 16, 1910, the plaintiff received a letter returning his entrance fee and contributions to the association and informing him that Mr. Spooner had been instructed not to receive any more money from him on behalf of the association. In my opinion the association was without power to expel a member. There was no rule purporting to give them such power, and, even had they possessed it, the attempt to expel the plaintiff without giving him any opportunity of obtaining a hearing would in my opinion have been illegal. Having regard to the circumstances of the case and the absence of any record of such a resolution in the minute-book, and the naturally indifferent recollection of the witness, I am not satisfied that any resolution purporting to expel the plaintiff was ever passed.

The only other question to be decided is whether a trade union having branches and employing delegates is a criminal association with the affairs of which the Court should decline to interfere in consequence of its character. This question is raised under two statutes passed in the reign of George III., namely, the Unlawful Societies Act, 1799 (39 Geo. 3, c. 79), and the Seditious Meetings Act, 1817 (57 Geo. 3, c. 19). Now, having regard to the titles and preambles of these Acts, it is, I think, plain that they were not intended to interfere with what were at that time considered by the law to be innocuous and useful associations (it is doubtful if trade unions would be included in that category), but undoubtedly they purport to prohibit certain acts connected with associations and meetings in general terms, and I find it difficult to put a reasonable interpretation upon either Act which would not have brought within its prohibition at the time of the passing of the Act the branches and the delegates of the modern trade union. It has been argued that these Acts are to be deemed obsolete inasmuch as their enforcement to-day would, as it is alleged, lead to manifest injustice and absurdity. Inasmuch, however, as both the Acts have received

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comparatively recent recognition and application, while injustice has been guarded against by limiting the right to prosecute for offences under them to the Attorney-General, I find it difficult to say that such of their provisions as have not already been repealed are not still available for the protection of the community against the evils at which they were aimed.

It is true that trade unions have in their own interests not been invested with a legal status, but when it is asserted, as it sometimes is, that trade unions are illegal associations, it is true only in the sense stated. Their existence has been repeatedly recognized by the Legislature and their affairs regulated by Acts of Parliament. Numerous decisions of the Courts have been come to with regard to them, and it has never until the present case, I think, been suggested that the membership of trade unions involved a criminal act. That trade unions are organized by means of largely independent branches and that they constantly employ delegates is and has long been notorious, and it would be ridiculous to suppose that both the Legislature and the Courts of justice remained in ignorance of facts so well known. Moreover, so far as branches are concerned, their existence has been in evidence before the Courts and is expressly referred to in the Acts of Parliament which have been cited. If, however, the Acts of George III. above referred to applied, the existence of the trade union branches would make every member of the union a participator in a criminal act, and their recognition by the Legislature, not for the purpose of imposing penalties but for the regulation of their affairs, would be wholly inexplicable. The conclusion, therefore, that trade unions are not criminal associations and consequently that the Acts of George III. do not apply, assuming as I do that the words of the Acts are sufficiently wide to cover trade unions with branches and delegates, seems to me inevitable. If this be so, it must be on one of two grounds, either that the statutes in question have become obsolete or that trade unions have been exonerated from their provisions by the Legislature. In my opinion the latter is the true explanation. There is no express provision in the Acts dealing with trade unions that the statutes of George III. shall not apply, but inasmuch as the manner in which Parliament has dealt with

them is quite inconsistent with their criminality, I think such a provision must of necessity be implied. I hold therefore that the plaintiff is entitled to a declaration that he is still a member of the defendant association and to the injunction for which he asks, with the costs of the action.

Solicitor for plaintiff: *C. T. Wilkinson.*

Solicitors for defendant association: *Bennett & Ferris, for W. H. Pownall, Nuneaton.*

H. L. F.

In re TAUNTON AND WEST OF ENGLAND PERPETUAL BENEFIT BUILDING SOCIETY AND ROBERTS' CONTRACT.

PARKER J.
1912
July 9.

[1912 T. 569.]

Vendor and Purchaser—Leasehold Property—Open Contract to sell—Breaches of Lessee's Covenants—Receipt for Rent—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 4.

Mortgagees by assignment of leasehold property agreed to sell it for the residue of the term. The contract provided that the property was sold subject to the covenants and conditions contained in the lease and to the rent thereby reserved, and that the assignment to the purchaser should contain a covenant indemnifying the vendors against the rent and covenants. At the time when the contract was entered into there were continuing breaches of the lessee's covenants to repair and paint (which were not usual covenants) in respect of which the lessors were threatening proceedings, but neither the vendors nor the purchaser knew or had notice of the breaches, and the purchaser did not know the nature of the covenants:—

Held, (1.) that the contractual provision above mentioned only meant that when the purchaser obtained his assignment he should take subject to the rent and covenants and should indemnify the vendors against payment of rent and performance of covenants in the future—not that he was to pay arrears of rent or make good breaches of covenant in the past; and (2.) that as the purchaser had shewn breaches of covenant, s. 3, sub-s. 4, of the Conveyancing Act, 1881, did not require the purchaser to assume that all the covenants in the lease had been performed.

Barnett v. *Wheeler* (1841) 7 M. & W. 364; *In re Highett and Bird's Contract* [1903] 1 Ch. 287; and *In re Allen and Driscoll's Contract* [1904] 2 Ch. 226, distinguished.

On March 9, 1912, Theodore Roberts entered into a contract

PARKER J. 1912

TAUNTON AND WEST OF ENGLAND PERPETUAL BENEFIT BUILDING SOCIETY AND ROBERTS' CONTRACT, *In re.*

with the Taunton and West of England Perpetual Benefit Building Society for the purchase by the former from the latter of a leasehold piece of land in Marshfield Street, Newport, Monmouthshire, and the two houses thereon, which were held for the residue of a term of 999 years from January 1, 1897, at the yearly rent of 150*l.*

By clause 1 of the agreement the society was to sell and the purchaser to purchase the land and houses for the residue of the term of 999 years from January 1, 1897, created by a lease dated January 18, 1909, from the Uskside Property Company, Limited, to H. M. Williams, then vested in the society under a mortgage from Williams dated March 1, 1909.

Clause 2 stated that the society was selling as such mortgagee as aforesaid and that its power to sell as such in the events which had happened should be assumed, and that the purchaser should accept the title subject to this provision and should not require the concurrence of the mortgagor.

Clause 3 provided that the title should commence with the lease.

Clause 4 was as follows: "The property is sold subject to the covenants and conditions contained in the said indenture of lease, and to the rent thereby reserved, and the assignment to the purchaser shall contain a covenant indemnifying the society against the said rent and covenants."

The lease contained covenants by the lessee to paint the outside wood and iron work once in every third year with three coats of good oil paint, and inside wood and iron work in like manner once in every seventh year, and to keep all the buildings in good and substantial repair; and it was admitted that these were not usual covenants.

The mortgage was by assignment.

At the time of the contract being entered into there were continuing breaches of the covenants to repair and paint, but the vendors and the purchaser were both ignorant of these facts.

The purchaser, on receiving an abstract of title, sent in the following and other requisitions:—

1. "Have all the covenants contained in the abstracted lease of January 18, 1909, been observed up to date?"

(4.) "When was the outside of the premises last painted?"

The answers of the vendors' solicitor were as follows:—

"1. The last receipt for ground rent can be produced, which is sufficient evidence that the covenants have been complied with. The vendors have no notice of any breach."

"(4.) I cannot say. See reply to No. 1."

The lessors had sent notices threatening proceedings in respect of the breaches of covenant, but neither the vendors nor the purchaser were aware of this before the summons was issued.

The purchaser took out an originating summons asking for a declaration that the vendors had not made out a good title to the property contracted to be sold and claiming a return of his deposit, and this summons was adjourned into Court.

Bertram Jacobs, for the purchaser. The receipt for the last payment of ground rent does not preclude the purchaser from shewing that there have been breaches of covenant where the vendors have to rely on the statutory condition contained in s. 3, sub-s. 4, of the Conveyancing Act, 1881. That only provides that on production of the receipt the purchaser is to assume, "unless the contrary appears," that the covenants of the lease have been duly performed. Here the contrary does appear.

[He was stopped.]

Warwick Draper, for the vendors. The purchaser had implied, if not express, notice that the covenants as to painting had not been complied with, and cannot require evidence that the covenants have been performed. The burden of proving the existing breach is now thrown upon the purchaser: *In re Highett and Bird's Contract.* (1)

[PARKER J. In that case there was an open contract. *Barnett* v. *Wheeler* (2) shews that where a vendor has entered into an express contract to deduce a good title, he is bound although the purchaser, at the time of sale, was aware of the breach of covenant.]

In re Highett and Bird's Contract (1) was explained by Romer L.J. in *In re Allen and Driscoll's Contract.* (3) Where, as

(1) [1903] 1 Ch. 287, 293. (2) 7 M. & W. 364.
(3) [1904] 2 Ch. 226, 231.

PARKER J. 1912

TAUNTON AND WEST OF ENGLAND PERPETUAL BENEFIT BUILDING SOCIETY AND ROBERTS' CONTRACT, *In re.*

in this case, there is no express contract to give a good title, and the purchaser has notice of the breach, the latter cannot rely on the breach as excusing him from performance of the contract. The vendors here were not aware that there had been any non-compliance with covenants, and the Court ought not to assist the purchaser on a summons in such a case as this. [He also referred to Hood and Challis on the Conveyancing, Settled Land, and Trustee Acts, 7th ed. p. 22.]

PARKER J. The questions which I have to decide on this summons arise in this way. The contract was for the sale by a building society to the purchaser of leaseholds of which the vendors were mortgagees by assignment and not by way of sub-demise. By clause 1 of the contract the vendors agree to sell the property for the residue of the term, which was then vested in the society. By clause 2 it is stated that the society are selling as mortgagees and that their powers to sell as such in the events which have happened shall be assumed. Clause 3 states that the title shall commence with the lease and shall be deemed to be accepted subject only to requisitions and objections sent in within a certain time. Clause 4 is as follows: "The property is sold subject to the covenants and conditions contained in the said indenture of lease and to the rent thereby reserved, and the assignment to the purchaser shall contain a covenant indemnifying the society against the said rent and covenants."

The first question which is raised is as to the true construction of clause 4. That only means that when he obtains his assignment the purchaser shall take the property subject to the rent and covenants and shall indemnify the society against payment of rent and performance of covenants in the future; it does not mean that he is to pay arrears of rent, or make good breaches of covenant in the past.

The facts appear to be as follows: At the time of and down to the period fixed for completion there had been breaches of covenant in respect of which the lessors had threatened or were threatening to proceed; but it does not appear that either the vendors or the purchaser had knowledge or notice of the

breaches, and the purchaser did not know even the nature of the covenants. They were not usual covenants. As where leaseholds are sold under an open contract, the vendors were under an obligation to shew that the rent had been paid and that the lessee's covenants had been performed. Sect. 3, sub-s. 4, of the Conveyancing Act, 1881, does not take away this obligation. It only provides that "where land sold is held by lease (not including under-lease) the purchaser, ... on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, ... shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase." That means that prima facie the receipt for the last rent due is evidence of the due performance of the covenants, but it does not prevent the purchaser from shewing, by other evidence, that the covenants have not in fact been performed.

This case is different from the case where there is an express condition that the receipt for the last rent due before completion shall be accepted as conclusive evidence of the performance and observance of the covenants in the lease or of the effectual waiver of any breach of covenant or condition up to the completion of the purchase. Where, as in this case, there is no such condition, and the vendor has to rely on the statutory condition, the purchaser may, notwithstanding the production of the receipt for rent, shew, by other evidence, that the covenants have not been observed.

It may be that where a purchaser has notice of the breach different considerations may arise, and there may be considerations where there is an express agreement to make a good title different from those which arise where there is an open contract. On this subject I have been referred to *Barnett* v. *Wheeler* (1) and to *In re Highett and Bird's Contract* (2) as explained by Romer L.J. in *In re Allen and Driscoll's Contract.* (3) But in my judgment those cases have no application to the present case, because here the purchaser had, when he

(1) 7 M. & W. 364. (2) [1903] 1 Ch. 287.
(3) [1904] 2 Ch. 226, 231.

PARKER J. 1912 TAUNTON AND WEST OF ENGLAND PERPETUAL BENEFIT BUILDING SOCIETY AND ROBERTS' CONTRACT, *In re.*

entered into the contract, no notice of any covenant of which there had been a breach, but only subsequently became aware of the true facts.

In my opinion, the vendors' obligation to make out a good title has not been discharged, as the lease has become forfeitable. The order will be to the effect following: The Court being of opinion that, so long as the lease remains forfeitable for non-compliance with the notice referred to in the evidence, the vendors have not made a good title, the purchaser to have liberty, if no title is made by the vendors within a month from the date of this order, to apply for the return of the deposit and for other consequential relief. The vendors to pay the purchaser's costs.

Solicitors for purchaser: *Indermaur & Brown, for Theodore Roberts, Newport, Mon.*

Solicitor for vendors: *E. E. Baron Reed, for C. P. Clarke, Taunton.*

F. E.

PARKER J. 1912 *June* 18; *July* 10.

In re LAING.

LAING *v.* MORRISON.

[1912 L. 466.]

Will—Construction—Gift in Case of being a Widow or Widower at Period of Distribution—Death of Widow before that Period—Survival of Male Donee and his Wife.

Testator gave his residuary estate upon trust for conversion and investment, and out of the income to pay an annuity to his wife for life, and an annuity to his sister M., provided she should be a widow at his death, until her remarriage or the death of his wife. He then directed the surplus income to be accumulated, that the accumulations should be applied as part of his residuary estate, and that on his wife's death the trustees should set apart certain legacies, including 1000*l.* to testator's sister M. provided she should be a widow at testator's wife's death, but in the event of M. then being a wife, in trust for her children equally. The ultimate residue after payment of these and other legacies was to be held in trust for such of certain named persons, including J. and M., as should be living at testator's wife's death. Then followed a proviso that the share of J. in the residue was subject to his being and only to be paid to him if he should be a widower at

testator's wife's death, and that the share of M. was subject to her being and only to be paid to her if she should be a widow at testator's wife's death, and that the share of J. if not a widower and the share of M. if not a widow at testator's wife's death should go to D. and F., children of M. M. never remarried, but died before testator's wife. J. and his wife and D. and F. all survived the testator's wife :—

Held, (1.) that J.'s share of residue went to D. and F.; (2.) that M.'s share of residue did not go to D. and F., as she was then dead; and (3.) that the legacy of 1000*l.* to M. was contingent on her being alive at testator's wife's death, and therefore failed.

In re Whitmore [1902] 2 Ch. 66; *Davies* v. *Davies* (1882) 30 W. R. 918; and *Brock* v. *Bradley* (1864) 33 Beav. 670, distinguished.

WILLIAM LAING, by his will, dated October 5, 1891, appointed George Henry Laing and two other persons executors and trustees thereof, and after giving his house and furniture to his wife, Ann Laing, for life, and giving certain absolute pecuniary legacies, he devised and bequeathed his residuary realty and personalty to his trustees, upon trust to convert the same into money and invest the proceeds, "and out of the income thereof to pay the following annuities, that is to say, to my said wife during her life 500*l.* per annum, but in the event of my said residence being sold during the lifetime of my said wife such annuity to be increased to 600*l.* per annum, to my sister Jane Leith Morrison, provided she shall be a widow at the time of my death 100*l.* per annum until her re-marriage or the death of my said wife, whichever event shall first happen." And the testator, after directing his trustees during his wife's lifetime to accumulate the surplus income by investing the same and the resulting income, and to hold and apply the accumulated fund as part of the capital of his residuary estate, directed that upon the death of his wife his trustees should stand possessed of his residuary estate "Upon trust to set apart thereout the sum of 1000*l.* and invest the same in any of the authorised investments, and to pay the annual income arising therefrom to my said brother James Laing during the life of his wife, and in the event of him surviving his said wife, then upon trust to pay or transfer to him the said capital sum of 1000*l.* or the investments representing the same, but in the event of his dying in the lifetime of his said wife then the said sum of 1000*l.* and the investments representing the same shall revert and fall into my residuary estate," and upon further

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trust to set apart another sum of 1000*l.* for a sister-in-law for life, "and upon further trust out of my residuary estate to pay the following legacies, that is to say, to my said sister Jane Leith Morrison (provided she shall be a widow at the time of the death of my said wife) the sum of 1000*l.*, but in the event of her being a wife at that time, then upon trust for her children or child if more than one in equal shares as tenants in common," and other legacies were to be set apart for other persons. The testator further directed that the remainder of his residuary estate should be held upon trust "for such of them my said brother James Laing, my said sister Jane Leith Morrison" and certain other named persons, including Jane Leith Laing Milburn, "as should be living at the time of the death of my said wife, if more than one as tenants in common, Provided always, and I hereby further declare that the share of my said brother James Laing in my residuary estate is subject to his being and is only to be paid to him if he shall be a widower at the time of the death of my said wife, and the share of my said sister Jane Leith Morrison is subject to her being and is only to be paid to her if she shall be a widow at the time of the death of my said wife, and that the share of my said brother James Laing, if he shall not be a widower, and the share of my said sister Jane Leith Morrison, if she shall not be a widow at the time of the death of my said wife, shall go to Donald Morrison and Fernie Morrison, children of my said sister Jane Leith Morrison, in equal shares as tenants in common, and in case either of them, the said Donald Morrison and Fernie Morrison, shall die in the life-time of my said wife, I bequeath the share of him or her so dying to the survivor of them."

The testator died on October 10, 1891, and his will was proved by all his executors, one of whom died in 1909 and another in 1911.

Jane Leith Morrison was a widow at the date of the will and never remarried. She died in March, 1903, intestate, leaving two children, Donald Morrison and Magdalene Anna Fernie Stirling, the wife of James Stirling.

The testator's widow died on June 11, 1911.

James Laing and his wife were both living when the present proceedings were taken.

George Henry Laing, the surviving executor and trustee, took out an originating summons against Donald Morrison, Magdalene Anna Fernie Stirling (wife of James Stirling), and Jane Leith Laing Milburn (spinster) for the determination of the following questions:—(1.) Whether in the event, which happened, of Jane L. Morrison predeceasing the testator's widow, the children of Jane L. Morrison were entitled to the legacy of 1000*l.* given to her; (2.) whether these children were entitled to the share of residue given to her in the event of her being alive and a widow at the death of the testator's wife, or whether the residue was divisible without counting her, and into what shares, and who were entitled thereto.

The summons was adjourned into Court and heard by Parker J. on June 18, 1912.

Gilbart-Smith, for the plaintiff, the surviving executor and trustee, stated the facts and the questions involved.

Romer, K.C., and *Tyldesley Jones*, for the defendants Donald Morrison and Mrs. Stirling (children of Jane Leith Morrison). There is no lapse in respect of the 1000*l.* legacy given to the testator's sister Jane Leith Morrison. For this purpose it is immaterial whether Jane Leith Morrison, in the events which happened, took the 1000*l.* absolutely, or whether the gift over to her children took effect. The proviso does not mean that she must be alive at the death of the testator's wife, but only that she must be a widow and not a married woman—in other words it must read in its negative form. The question to be considered is always, What is the true contingency? The contingency which this testator was anxious to guard against was that of his sister being a wife at the time when the gift was to take effect. The Court will depart from the strict words when it is satisfied that the result of such departure will be to give effect to the contingency contemplated by the testator: Theobald on Wills, 7th ed. p. 656; *Davies* v. *Davies* (1); *Brock* v. *Bradley*. (2)

The second question, which is whether the children of Jane Leith Morrison are entitled to the share of residue given to their

(1) 30 W. R. 918. (2) 33 Beav. 670.

PARKER J. 1912 LAING, *In re.* LAING *v.* MORRISON.

mother in the event of her being alive and a widow at the date of the testator's wife's death, depends upon another line of authorities altogether. The Court is entitled to look at the whole will to see whether the testator is declaring trusts or giving directions in respect of a share which he has given, or only in respect of a share which the legatee would have taken if she had survived the period of distribution. It is submitted that "the share of my said sister" means the aliquot share which she would have taken if she had survived the period of distribution: *In re Whitmore.* (1) Any other construction would lead to a capricious distribution of the residue. Why should the right of the children to take the share their mother did not take depend upon whether the mother survived the period of distribution and was then a wife? If the gift is capricious the Court adopts another construction even at the cost of reading the will not strictly grammatically.

[PARKER J. In *In re Whitmore* (1) the shares were settled by stocks, and I agree that there would have been a capricious distribution if the will had been read in any other way than that adopted by the Court of Appeal. This case is different.]

Martelli, K.C., and *J. S. Green*, for the residuary legatees. There is no justification for reading in a provision for an event for which the testator has not provided. There were only two contingencies present to the testator's mind, namely, his sister being a widow, and her being a wife. In *Davies* v. *Davies* (2) the real contingency contemplated was that of the wife being dead at the expiration of twelve months from the death of the testator. In other words the crucial time was the expiration of the period, therefore the fact that the wife predeceased the testator was held not to affect the gift over. As regards *In re Whitmore* (1) the shares were settled per stirpes and the first takers were not the tenants for life, but the tenants for life and their children. In the present case the children of the testator's sister are but secondary objects of his bounty. [They referred to *In re Roberts.* (3)]

Cur. adv. vult.

(1) [1902] 2 Ch. 66. (2) 30 W. R. 918.
(3) (1885) 30 Ch. D. 234.

July 10. PARKER J. In this case the testator gave his residuary estate to his trustees, on trust for conversion and investment, and, out of the income thereof, to pay certain annuities to his wife, and also an annuity to his sister, Jane Leith Morrison, provided she should be a widow at the testator's death, such annuity being determinable on her re-marriage or on the death of the testator's wife. Subject to these annuities, the income of the estate was to be accumulated during the lifetime of the testator's wife, and on her death the trustees were to set apart or pay various legacies, including (1.) a legacy of 1000*l.*, to be held in trust for the testator's brother James for the life of James's wife, and, if he should survive his wife, for him absolutely, but otherwise to fall back into residue, and (2.) a legacy of 1000*l.* to the testator's sister, Jane Leith Morrison, provided she should be a widow at the death of the testator's wife, but, in the event of her being a wife at that date, then in trust for her children equally. The ultimate residue of the estate, after provision for those legacies, was to be held upon trust for such of certain named persons including the testator's brother James and his sister Jane Leith Morrison as should be living at the death of the testator's wife. Then comes the following proviso: "Provided always, and I hereby further declare that the share of my said brother James Laing in my residuary estate is subject to his being and is only to be paid to him if he shall be a widower at the time of the death of my said wife, and the share of my said sister Jane Leith Morrison is subject to her being and is only to be paid to her if she shall be a widow at the time of the death of my said wife, and that the share of my said brother James Laing, if he shall not be a widower, and the share of my said sister Jane Leith Morrison, if she shall not be a widow at the time of the death of my said wife, shall go to Donald Morrison and Fernie Morrison, children of my said sister Jane Leith Morrison, in equal shares as tenants in common, and in case either of them, the said Donald Morrison and Fernie Morrison, shall die in the lifetime of my said wife, I bequeath the share of him or her so dying to the survivor of them."

The testator's wife survived him, and died on June 11, 1911. The testator's brother James and James's wife are still living.

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The testator's sister Jane Leith Morrison never remarried, but, having survived the testator, died in the lifetime of the testator's wife, leaving the two children named in the proviso her surviving. These children are still living and are defendants.

Under these circumstances there can, I think, be no doubt that James's aliquot share in the residue goes in equal shares to the two children of Jane Leith Morrison. With regard to Jane Leith Morrison herself, she was certainly not a widow at the death of the testator's wife. If, therefore, she took a share in residue, it also would go to her two children. But, according to the strict language of the will, she can take no share in the residue unless she survives the period of distribution.

It is suggested that, on the authority of *In re Whitmore* (1), I can in the gift to her children construe the words "the share of my said sister" as "the aliquot share which my said sister would have taken had she survived the period of distribution." I do not think I am at liberty to construe the will in this manner. The share which is only to be paid to Jane Leith Morrison if she is a widow is obviously the share which she actually takes under the preceding gift, and not the share which she would have taken if she had survived the period of distribution, and the share which, if she is not a widow, is to go over to her children is obviously the same share.

There is another question, relating to the legacy of 1000*l.* given to Jane Leith Morrison provided she should be a widow at the death of the testator's wife, but in the event of her being a wife at the testator's wife's death to her children equally. Strictly speaking, each of these gifts is contingent upon Jane Leith Morrison's possessing a certain personal status when the legacy becomes payable. It is, therefore, contingent upon her being alive at that date, which event did not happen. It is suggested that I can depart from that strict interpretation of the words in order to give effect to some obvious intention which would be otherwise defeated, and reliance is placed on such cases as *Davies* v. *Davies* (2) and *Brock* v. *Bradley.* (3)

In the former case, if the wife survived the testator by twelve

(1) [1902] 2 Ch. 66. (2) 30 W. R. 918.
(3) 33 Beav. 670.

months, she was to have a life interest, with remainder, as to one moiety, as she should appoint by will, and, as to the other moiety, for the testator's sister, who was to have the whole if the wife died within the twelve months or if she died without exercising the power. The wife died in the testator's lifetime, and not within twelve months of his decease, but it was held, in accordance with the obvious intention, that the sister took the whole.

In the latter case there was a gift to a lady for life, with remainder to her children, and, in default of children, if she survived her husband to her absolutely, but if she died in his lifetime, then as she should appoint by will, and in default of appointment to her next of kin. The lady, who never married, was held to take an absolute interest, again in accordance with the obvious intention.

In the present case, in the events which have happened, it is difficult to say what the intention of the testator was. It is equally possible to argue (1.) that Jane Leith Morrison was intended to take all that was not given to her children in the event of her being a wife when the legacy became payable, or (2.) that her children were intended to take all that was not given to her in the event of her being a widow when the legacy became payable. Under these circumstances I have come to the conclusion, with some hesitation, that there is no sufficient reason for departing from the literal meaning of the words used and I hold that the legacy fails.

Solicitors for plaintiff: *Ince, Colt & Ince, for Robert Brown & Son, Newcastle-upon-Tyne.*

Solicitors for defendants D. Morrison and Mrs. Stirling: *Robinson & Barrett.*

Solicitor for residuary legatees: *Chalton Hubbard.*

F. E.

C. A.
1912
June 26, 27; July 2.

In re BONACINA.
LE BRASSEUR *v.* BONACINA.

[1908 B. 2159.]

Administration—Debt—Bankruptcy of Debtor—Discharge—Statutory Release—Subsequent Acknowledgment of Debt—Foreign Document—New Contract after Discharge—Consideration—Proceeding "in respect of a debt"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 30, *sub-s.* 3.

An Italian subject trading in England became bankrupt in 1897, and obtained his discharge in 1901. At the date of his bankruptcy he was indebted to a creditor, also an Italian subject, but this debt was not disclosed in the bankruptcy proceedings, of which the creditor was unaware. In 1906 the debtor signed a document (privata scrittura) in Italian form, whereby he acknowledged to the creditor the amount of the debt and undertook to pay it off within five years with interest. In March, 1908, the debtor died, and in an action to administer his estate in this country the creditor claimed to prove for the amount of the debt. According to Italian law no consideration was necessary to support a promise to pay the old debt, there being a moral obligation to pay which, by the execution of the privata scrittura, was converted into a valid legal obligation. It was held by Eve J. (ante, p. 68) that, assuming judgment could be recovered upon the document in Italy, the claim could not be enforced in England, since it was "a proceeding in respect of a debt" within s. 30, sub-s. 3, of the Bankruptcy Act, 1883, from which the debtor had obtained a statutory release by his discharge:—

Held by the Court of Appeal, that the document of 1906 constituted a new and enforceable contract entered into after the discharge, and that the claim was not therefore barred by the provisions of s. 30, sub-s. 3.

Decision of Eve J., ante, p. 68, reversed.

Jakeman v. *Cook* (1878) 4 Ex. D. 26, and *In re Aylmer* (1893) 1 Manson, 391; 70 L. T. 244, followed.

Kidson v. *Turner* (1858) 3 H. & N. 581, and *Heather & Son* v. *Webb* (1876) 2 C. P. D. 1, distinguished.

This was an appeal from a decision of Eve J., reported ante, p. 68.

On August 30, 1897, Lodovico Carlo Bonacina, an Italian subject long resident in England, was adjudicated a bankrupt, and on August 10, 1901, he obtained his discharge. At the commencement of the bankruptcy he was indebted to the appellant, Giacomo Mina, of Monza, in the kingdom of Italy, for advances in the sum of 1350*l.*, carrying interest originally at 5 per cent., and later at 4 per cent., but he never disclosed this indebtedness

in the bankruptcy proceedings, nor did the creditor know of those proceedings, until after the death of Bonacina, which occurred on March 31, 1908. During the years 1902 and 1904 Bonacina made various payments, amounting to about 250*l.*, to the creditor on account of the debt.

On October 15, 1906, Bonacina signed in Italy an Italian document, the terms of which are set out in the report in the Court below (1), whereby he acknowledged to Mina his then indebtedness, which represented the balance of the debt owing at the commencement of the bankruptcy and subsequent interest, at the sum of 43,959 Italian lire, equivalent to about 1750*l.*, and agreed to pay off the debt by instalments or otherwise within five years from January 1, 1907, and in the meantime to pay interest on the unpaid part at 4 per cent. per annum from the last-mentioned date.

This document, which was called "privata scrittura," was by its terms deemed to be a public instrument. It appeared from the evidence of Italian advocates that according to the law of Italy the English doctrine of consideration being necessary to support a contract had no application, and further that the effect of the execution of the "privata scrittura" after the discharge in bankruptcy was to transform the moral obligation to pay the debt, which existed under Italian law, into a legal obligation valid and enforceable in Italy.

In an action to administer Bonacina's estate in this country a claim was brought in by Mina as a creditor for 1758*l.* 7*s.* 6*d.* and interest. Upon a summons to allow the claim as a debt provable against the testator's estate, Eve J. held that the document of October 15, 1906, gave rise to no cause of action according to English law, being a voluntary promise to pay for which there was no consideration; and, further, that, even assuming that judgment could be recovered in Italy upon the document, it could not be enforced in England, since the claim was "a proceeding in respect of a debt" from which the debtor had obtained a statutory release by his discharge, and s. 30, sub-s. 3, of the Bankruptcy Act, 1883, applied.

From that decision the creditor appealed.

(1) Ante, p. 68.

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BONACINA, *In re.* LE BRASSEUR *v.* BONACINA.

Maugham (*Clayton*, *K.C.*, with him), for the appellant. The appellant's claim is to prove for a debt under a new contract entered into after a discharge in bankruptcy. The contract would not be binding if it were an English contract, because there was no consideration, but it is an Italian contract to be construed according to Italian law, and the evidence of Italian jurists is clear that after a discharge in bankruptcy there remains a moral obligation to pay the debt, and that the execution of a document called a "privata scrittura" which was executed by the debtor in this case converts the moral obligation into a legal one and so gives a new cause of action. If the contract is an Italian contract, binding in Italian law, it can be enforced here: Dicey on the Conflict of Laws, 2nd ed., r. 151, pp. 545, 549.

[KENNEDY L.J. Is not the case determined by the lex fori? It has been held that the English Courts would not enforce a foreign contract which the Statute of Frauds would make invalid here.]

That was decided in *Leroux* v. *Brown* (1), but as a question of evidence, and so of procedure governed by the lex fori. Dicey says that a Scotch contract, good in Scotland, but bad in England for want of consideration, may be enforced. *Saxby* v. *Fulton* (2) and similar cases as to gambling are in my favour. Moreover the contract was to pay by instalments in five years; in effect it amounted to giving the debtor time.

P. O. Lawrence, *K.C.*, and *H. F. F. Greenland*, for the executor of the debtor. This claim is a proceeding "in respect of a debt" within s. 30, sub-s. 3, of the Bankruptcy Act, 1883, and that section is a complete answer to the claim: see *Kidson* v. *Turner* (3), a decision under a similar clause in the Act of 1849. *Heather & Son* v. *Webb* (4) shews that the fact that the creditor did not know of the bankruptcy makes no difference. A discharge in an English bankruptcy is a good discharge everywhere. The evidence as to the continuance of a moral obligation in Italian law only applies to a composition with creditors under the Italian law; it is not directed to an English discharge.

Under the old law, where there was a legal right the remedy

(1) (1852) 12 C. B. 801.
(2) [1909] 2 K. B. 208, 219.
(3) 3 H. & N. 581.
(4) 2 C. P. D. 1.

for which was barred, though the right continued to exist, as in the case of debts the remedy for which was barred by bankruptcy, the moral obligation arising from such existing right formed a sufficient consideration to support a promise, and so the debt might be revived by a subsequent promise of the debtor to pay it: *Hawkes* v. *Saunders* (1); *Trueman* v. *Fenton.* (2)

By the Act 6 Geo. 4, c. 16, s. 131, it was enacted that no such promise to pay could be sued upon unless it was in writing.

By the Insolvent Debtors Act, 1826 (7 Geo. 4, c. 57), s. 61, it was provided that after discharge no execution should issue against an insolvent debtor for debts to which the adjudication extended, and to any action for such debts the discharge could be pleaded generally. In *Evans* v. *Williams* (3), a case under that Act, Lord Lyndhurst held that a new contract to secure the old debt was bad, although additional consideration was thrown in.

By the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 204, a great change was effected. That section enacted that no bankrupt should be liable to pay any debt from which he should have been discharged by virtue of his certificate, upon any contract, promise, or agreement made after the filing of the petition for adjudication; and in *Kidson* v. *Turner* (4) it was held that the section applied not only to a contract, promise, or agreement requiring a consideration to support it, but to contracts under seal.

By the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 164, a promise to pay a debt barred by the certificate of discharge was made void.

Under that Act it was decided in *Rimini* v. *Van Praagh* (5) that a bill of exchange given by the debtor to a creditor, who was barred by a composition deed, for his old debt was void.

By the Act 32 & 33 Vict. c. 83, s. 20, the Act of 1861 was repealed, and by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 49, the law was made very much what it is in this respect under the Bankruptcy Act, 1883, s. 30.

(1) (1775) 1 Cowp. 289, 290.
(2) (1777) 2 Cowp. 544.
(3) (1832) 1 Cr. & M. 30.
(4) 3 H. & N. 581.
(5) (1872) L. R. 8 Q. B. 1.

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We rely upon *Heather & Son* v. *Webb* (1), where a promise to pay a debt barred by the bankruptcy, which could only be supported by the moral obligation which existed under the old law, was held bad. *Jakeman* v. *Cook* (2), which was relied upon by the applicant in the Court below, is only reconcilable with the decisions on the ground that there was altogether a new debt.

[KENNEDY L.J. That case was approved by Lord Selborne in *Ex parte Barrow.* (3)]

Here there was no intention to make a new contract. The document of 1906 was merely a written acknowledgment of the amount of an existing debt.

[KENNEDY L.J. referred to *In re Aylmer.* (4)]

The claim here is simply a proceeding in respect of a debt which has been discharged, and the defence pleaded is clearly a matter of procedure which is governed by the lex fori. It does not go to the validity of the contract at all: Dicey on the Conflict of Laws, 2nd ed., r. 148, pp. 532, 533, and pp. 708—710; *Leroux* v. *Brown* (5); *Huber* v. *Steiner* (6); *Blackburn Corporation* v. *Sanderson* (7); *Moulis* v. *Owen* (8); *Quarrier* v. *Colston* (9); *Robinson* v. *Bland.* (10)

The question whether there was a good contract enforceable in Italy depends upon the evidence of the Italian experts. That goes to shew that after a release in proceedings for liquidation by arrangement the debtor remains morally bound to pay his debts, and that the moral obligation may be a consideration for a written promise to pay. But be that as it may, no enforceable debt has been proved against the testator's estate.

Clayton, K.C., in reply. The appellant relies upon a new contract executed in Italy after the discharge in bankruptcy. It is true that that contract if entered into in England would not be enforceable, because it would be nudum pactum, but it would not be barred by the bankruptcy, because the statutory

(1) 2 C. P. D. 1.
(2) 4 Ex. D. 26.
(3) (1881) 18 Ch. D. 464, 470.
(4) 1 Manson, 391; 70 L. T. 244.
(5) 12 C. B. 801.
(6) (1835) 2 Bing. N. C. 202.
(7) [1902] 1 K. B. 794, 807.
(8) [1907] 1 K. B. 746, 753.
(9) (1842) 1 Ph. 147.
(10) (1760) 2 Burr. 1077.

release does not apply to a contract entered into after the receiving order. It is only debts provable in the bankruptcy which are released, and a contract made after the receiving order cannot be the foundation of a debt provable in the bankruptcy.

Kidson v. *Turner* (1) did apply to a contract made after the bankruptcy, but that was decided on the special provisions of the Act of 1849, which are very different to s. 30, sub-s. 3, of the Act of 1883. There was a new contract here enforceable according to Italian law. It was made in Italy in Italian form and language, both the parties to it were Italians, and it was intended to be performed in Italy. It is not contrary to public morals or public policy and will therefore be enforced in this country.

Cur. adv. vult.

July 2. COZENS-HARDY M.R. This is an appeal from a decision of Eve J., who has disallowed a claim in an administration action. The testator and the claimant were both Italians. The testator, who was resident in England, was adjudicated bankrupt in 1897 and obtained his discharge in 1901. The claimant had made various advances to the testator prior to the discharge. No proof was made by the claimant in the bankruptcy, for the best possible reason, that he was not aware of the bankruptcy. On October 15, 1906, a document was executed in Italy by which the testator acknowledged his debt to the claimant as being 43,959 lire, which sum he undertook to pay within five years with interest. This document, which is called "privata scrittura," was to be deemed to be a public instrument. It was contended on behalf of the executor that by virtue of s. 30, sub-s. 3, of the Bankruptcy Act, 1883, no proceedings could be taken in England in respect of this debt, and Eve J. has assented to this view.

It is important to observe that the order of discharge only released the bankrupt from debts provable in bankruptcy and that sub-s. 3 has no operation except in respect of a debt from which the bankrupt was released by the order of discharge: as to which see s. 37, sub-s. 3. It has been held by a Divisional Court in *Jakeman* v. *Cook* (2), and by Vaughan Williams J.

(1) 3 H. & N. 581. (2) 4 Ex. D. 26.

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in *In re Aylmer* (1), that a promise after discharge to pay a debt barred by the discharge is perfectly good if supported by a new and valuable consideration. If therefore in 1906 an English contract for value had been executed, I think the proof must plainly have been admitted. But the "privata scrittura" is a document subject to Italian law, and the evidence adduced by Italian lawyers seems to me to have established that according to the law of Italy the English doctrine of consideration being necessary to support a contract has no application, and further that the moral obligation to pay the debt is sufficient to found a legal obligation if a document such as the "privata scrittura" has been executed. It seems to me, therefore, that the claimant is in precisely the same position in this country as he would have been if there had been an English contract of the same date with a new and valuable consideration. In short, the claimant relies upon a new and enforceable contract entered into after the discharge and therefore not in any way subject to the provisions of s. 30, sub-s. 3.

I was for some time pressed by the decision in *Kidson* v. *Turner* (2), but that case really turned upon the language of s. 204 of the Bankruptcy Act, 1849, which differs materially from s. 30 of the present Act. The words there were that no bankrupt after his certificate should be liable to pay any debt from which he will have been discharged by virtue of his certificate "upon any contract, promise, or agreement made after the issuing of the fiat or filing of the petition for adjudication," and it was there held that a bond given by a bankrupt in consideration of a debt from which he had been discharged was, within the meaning of that section, a contract or agreement after the issuing of the fiat or filing of the petition for adjudication. It seems to me that that case is really no authority upon the present case. Nor do I think that the decision of the Divisional Court in *Heather & Son* v. *Webb* (3) has any application. In that case there was a contract without any consideration to pay a debt barred by the bankruptcy. In the present case there is a valid enforceable new contract subsequent to the discharge.

(1) 1 Manson, 391; 70 L. T. 244. (2) 3 H. & N. 581.
(3) 2 C. P. D. 1.

In the view which I take, it is not necessary to consider many of the interesting and important questions discussed by Mr. Lawrence in his able argument. For these reasons I think that the decision of Eve J. must be reversed, and the claim must be allowed and the Master's certificate varied accordingly.

FARWELL L.J. I am of the same opinion. If an action were brought here on the agreement of October 15, 1906, as on a stated account it would fail, for the items on which the stated account is founded would at once disclose the want of any consideration to support it. The moral duty which in Lord Mansfield's time sufficed is no longer available, because the Act of 1883 releases the bankrupt from all debts provable in bankruptcy and enables him to plead his discharge as a bar to any proceedings "in respect of any debt from which he is released by the order." The necessity of going back to the old debt as a consideration brings the action within the words "in respect of," &c. The term "cause of action" includes cases where so much of the cause of action as constitutes the consideration for the promise has occurred before the discharge: per Lindley J. in *Heather & Son* v. *Webb.* (1) But while the Act destroys the consideration formerly available, it does not make it illegal, still less immoral, to pay, or agree to pay, the released debt. If therefore the bankrupt after discharge enters into a new contract for valuable consideration he may bind himself to pay the amount of the old debt. Honourable men pay their just debts if they can, whether protected by a release in bankruptcy or not, just as honourable men pay bets fairly lost although irrecoverable at law. The distinction between a contract which is merely void and one which is immoral is well settled. The first is a mere nullity, innocuous for good or ill. The latter taints and destroys the whole of the new contract, as I have tried to explain in *Hyams* v. *Stuart King.* (2) If therefore a bankrupt who has got his discharge wishes to deal with his former tradesmen and finds that they refuse to supply him at ordinary prices unless and until he pays or secures the balance of their debts proved in the bankruptcy, it is competent to them to enter into a valid

(1) 2 C. P. D. 9. (2) [1908] 2 K. B. 696, 726, 727. now reversed

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contract to secure their object: *Jakeman* v. *Cook* (1) and *In re Aylmer.* (2) All that is requisite to such a bargain is that it should be made after discharge bona fide for value. Whether the seal on a bond would be sufficient consideration I will not stay to consider. The case of *Kidson* v. *Turner* (3) can be dealt with when it arises.

Now in the present case the new contract, although made long after discharge, has in English law no consideration to support it: but it is an Italian contract made in Italy between Italians and is governed by Italian law, and the expert evidence convinces me that it is a contract valid and enforceable in Italy. If so, the only bar to its validity here disappears. No question of procedure arises; a contract which is void (not being immoral) here may be perfectly good in a foreign country, and, if so, can be enforced here, unless there is some rule of procedure that forbids the action: see *Moulis* v. *Owen.* (4) But there is no such rule unless the discharge can be effectually pleaded as a release: and it cannot be so pleaded, because the contract is subsequent to the discharge, and the question of consideration goes, not to the procedure, but to the validity of the contract, and that is a matter of foreign law.

KENNEDY L.J. It appears to me, after considering the excellent arguments of the learned counsel on both sides, that our decision in this case must depend upon the character and effect of the "privata scrittura" as a legal document according to the law of Italy. If the claim put forward by the appellant ought to be regarded simply as a claim to obtain the payment of a debt which under s. 37 of the Bankruptcy Act, 1883, constituted a debt provable in the bankruptcy of the debtor, and therefore a debt from which under s. 30, sub-s. 2, the debtor was released by his order of discharge, it is clear that s. 30, sub-s. 3, enables the respondent, the debtor's executor, to make a successful defence to the claim, and that the judgment of Eve J., disallowing the claim, is perfectly correct. The objection to the maintenance of

(1) 4 Ex. D. 26.
(2) 1 Manson, 391; 70 L. T. 244.
(3) 3 H. & N. 581.
(4) [1907] 1 K. B. 746.

such a claim which is created by s. 30, sub-s. 3, is a matter of legal procedure, and in all such matters the lex fori prevails. But—and it is here that I feel myself obliged to part company from the learned judge in the Court below—ought the appellant's claim to be treated simply as a claim in respect of a debt which was provable in the bankruptcy of the deceased debtor? It appears to me that it ought not. The learned judge has treated the "privata scrittura" as a document which deserves as little consideration from the Court as the debtor's promise to pay received from the Court of Common Pleas in the decision of *Heather & Son* v. *Webb* (1), the principle of which he holds to govern the present case. I am unable to concur in this view. The effect of the "privata scrittura" as a legal obligation must be determined by the law of Italy; and, as I understand the evidence adduced in regard to that law, this "privata scrittura" created in and by itself as against Bonacina a valid and legally enforceable obligation from the time of its signature by Bonacina on October 15, 1906, five years, I think, after he had obtained his discharge in the English bankruptcy, of which, until after Bonacina's death, the appellant knew nothing. In *Heather & Son* v. *Webb* (1) the claim of the plaintiff was in respect of an old debt provable in the defendant's bankruptcy, and the mere promise of the debtor to pay, notwithstanding his previous discharge in bankruptcy, inasmuch as there was no consideration for the promise, could not create any new obligation according to the law of England. If there had been a valuable consideration for the promise, the judgment of the Court, as is shewn by the later case of *Jakeman* v. *Cook* (2), would have been different.

The doctrine of consideration as it exists with us is peculiar to our common law; it is not to be found in the law of Italy or, so far as I am aware, in the law of other Continental countries which derive the principles of their jurisprudence in regard to contractual obligations from the Roman source. The "privata scrittura" in the present case, being based upon the moral obligation to pay a just debt, created, according to Italian law, as new

(1) 2 C. P. D. 1. (2) 4 Ex. D. 26.

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and valid a legal obligation as the contract of a debtor for good consideration to pay a debt from which the debtor had been released by a discharge in bankruptcy was held by the Court of Exchequer to have created in the case of *Jakeman* v. *Cook*. (1) See also the judgment of Vaughan Williams J. in *In re Aylmer*. (2) The interpretation and the obligation of the "privata scrittura" are, as Eve J. stated in his judgment governed by the law of Italy—the proper law of the contract; but, if this be so, the claim to which it gave rise was a new claim as new as the claim created by the post-bankruptcy agreement between creditor and debtor in *Jakeman* v. *Cook* (1); and being such, as it appears to me, the claim of the appellant cannot rightly be treated as a claim in respect of a debt provable in the bankruptcy of Bonacina according to the Bankruptcy Act, 1883 This appeal, therefore, should be allowed.

Solicitors: *White & Leonard; Le Brasseur & Oakley.*

(1) 4 Ex. D. 26. (2) 1 Manson, 391; 70 L. T. 244.

G. A. S.

In re BAKER.

PARKER J.

1912

May 15.

Solicitor — Costs—Scale Fees—Mortgage to Bank for Unnamed Amount— "Completed Mortgage"—General Order under Solicitors' Remuneration Act, 1881, *r.* 2 (*a*); *Sched. I., Part I.*

Rule (2) (*a*) and Part I. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, apply not only to legal mortgages, but also to equitable mortgages, and memoranda of charge, though in some of those cases questions may arise, under particular circumstances, whether they fall within the scale, on the ground that the whole of the business in respect of which the scale imposes fees has not been done.

Although the scale only applies where the transaction has been "completed," the question in every case is whether there has been completion in substance; and although the scale does not apply where a mortgage is given to secure money which may or may not be advanced, at the option of the lender, yet where mortgagees have agreed to advance a certain fixed sum, and everything contemplated by the scale has been done except actually paying over the money, postponement of the payment of the money at the request of the mortgagor will not take the transaction out of the scale, although the mortgage itself—as in the ordinary case of a mortgage to a bank by a customer—does not state the amount secured.

The Court is not tied down by the form which the security takes, but is entitled to look at the substance of the transaction.

In 1909 G. E. Bennett instructed Mr. R. H. T. Baker, his solicitor, to apply to the Capital and Counties Bank, Limited, Southend branch, for the loan, temporarily, of 3000*l.* on the security of a memorandum of charge upon landed property belonging to Bennett.

Mr. Baker applied to the bank for the loan of the 3000*l.* on the security offered, and the bank agreed to lend the money on condition that Mr. Baker should on behalf of the bank investigate and advise it on the title to the property and should himself guarantee the repayment of the 3000*l.*, when lent, within a certain time.

Mr. Baker advised the bank on the title, gave it the guarantee, and carried the mortgage transaction through on behalf of Bennett and the bank by having the deeds deposited, and a memorandum of charge executed. This memorandum was

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dated and executed on November 18, 1909, and stated that, in consideration of the bank having made advances to Bennett and forbearing to require immediate payment of the same, certain specified documents were deposited with the bank for the better securing repayment of such advances or any renewal thereof and as a general cover upon all the customer's accounts with the bank, including banker's interest and its usual commission and other lawful charges, such interest, commission, and charges to continue accruing due until actual payment of the moneys thereby secured and notwithstanding judgment in the meantime recovered. The memorandum also contained an undertaking, when called upon, to execute an assurance of the property represented by the deposited documents by way of mortgage, with power of sale, in the bank's usual form, to such person or persons as the bank should direct, or any other document which it might deem requisite for the better securing the said advances and enabling the bank to realize the same and any other moneys which might at any time be owing by the customer to the bank, either separately, or jointly, or in co-partnership with any other person or persons, and either as principal debtor or as surety for any other person or persons, including such interest, commission, and charges as aforesaid. The memorandum also declared that, until such property should be so assured, the same was and should be held, in whosesoever names it stood, upon trust for the bank for the purposes and to the extent of the security thereby agreed to be given.

The guarantee bore the same date, and consisted of a letter written by Mr. Baker to the manager of the bank in the terms following: "Dear Sir,—Bennett's Loan, 3000*l.*—In consideration of your making Mr. G. E. Bennett and myself an advance of 3000*l.* I undertake that the same be repaid to you within six months from the date of the loan."

According to the original arrangement the 3000*l.* was to be placed to a joint account in the names of Bennett and Mr. Baker, but ultimately Bennett suggested that there was no need to advance all the 3000*l.* at once, and that, to save interest and banking charges, the money should be advanced as and when required. This suggestion was acted on, and the 3000*l.* (with

the possible exception of 11*s.* 11*d.*) was advanced in various sums from November 18, 1909, to February 8, 1910.

Mr. Baker claimed to be entitled to costs according to the scale of charges in Sched. I., Part I., to the Order under the Solicitors' Remuneration Act, 1881, under the items "Mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage, and completing," "Mortgagee's solicitor for negotiating loan," and "Do., do., for investigating title to freehold, copyhold, or leasehold property; and preparing and completing mortgage."

The client took proceedings for taxation of the costs, and the taxing Master decided that the scale was not applicable to the transaction and certified accordingly.

Mr. Baker took out a summons to review the taxing Master's certificate.

Ward Coldridge, in support of the summons. By the scale of charges in Sched. I., Part I., to the Order under the Solicitors' Remuneration Act, 1881, certain scale fees are payable to "Mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage, and completing"; to "Mortgagee's solicitor for negotiating loan"; and to "Do., do., for investigating title to freehold, copyhold, or leasehold property; and preparing and completing mortgage." By r. 11 of Sched. I., Part I., the scale for negotiating, as to a mortgagee's solicitor, only applies "to cases where he arranges and obtains the loan from a person for whom he acts," and by r. 3, "where a solicitor is concerned for both mortgagor and mortgagee, he is to be entitled to charge the mortgagee's solicitor's charges, and one half of those which would be allowed to the mortgagor's solicitor up to 5000*l.*" The rules therefore contemplate one solicitor acting for both mortgagor and mortgagee. It has been held that the scale fee to "Mortgagee's solicitor for negotiating loan" is applicable to all cases of loans on mortgages, although it would not be to the case of a loan upon a promissory note or money borrowed from bankers "without any specific security": *In re Furber.* (1) There is nothing in the Act or the Order under it, or

(1) [1898] 2 Ch. 538, 543.

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the scheduled rules, to limit the scale to a legal mortgage, and it is submitted that it applies to both legal and equitable mortgages, however created.

In *In re Bircham* (1) the Court of Appeal held that a trust or covering deed executed by a limited company to trustees to secure debentures intended to be, but never in fact, issued was not a completed mortgage under the rules, and that the trustees' solicitor was not entitled to charge the scale fee for "preparing and completing mortgage." In the course of his judgment Lindley L.J. said: "I doubt very much whether Mr. Parker is right when he says a mortgage to secure further advances would be brought within the scale. Suppose nothing is due? I doubt very much whether the scale would apply, and I doubt very much whether he is right in saying that a solicitor would be entitled to the scale fee upon the largest sum that might be covered by the stamp. As I say, I doubt it; but we have not to decide that." And Rigby L.J. said: "Whether it could be a mortgage, even if the debentures had been previously issued (I mean a mortgage within the meaning of the statute), or not, may be open to more doubt, though, so far as I am personally concerned, I think that the completed mortgage must be a mortgage completed in a business sense at the time. I say advisedly a business sense. I do not mean to say that if the mortgagees did not pay their money in twenty-four hours, or anything of that sort; but if the meaning was that they were to pay at once, and if they did pay practically in accordance with the agreement, that would be one thing; but when it comes to an arrangement which may extend over years, and which never may be carried out at all, I do not think that it could be possible by anything that followed afterwards to turn that into a complete mortgage which was not intended to be a complete mortgage at the time when it was drawn."

In *Barton to Irvine* (2) the Court of Appeal in Ireland held that the scale did not apply in the case of a mortgage to a bank to secure all sums then due or thereafter to grow due, with interest, the amount of the consideration not appearing on the face of the mortgage deed, although it bore a stamp sufficient to cover

(1) [1895] 2 Ch. 786, 796, 798. (2) [1899] 1 I. R. 515, 520.

advances up to the sum of 3000*l.* FitzGibbon L.J. says that in *In re Bircham* (1) "the judges seem to me to have held that the schedule does not apply to a deed which has not been so 'completed' that a specific sum of money can be ascertained to be secured by it, so as to fix the principal sum on which the solicitor is to get his poundage." But if the decision is sound, which seems open to doubt, the case is different from the present case, because there, as appears by the judgment of Lord Ashbourne L.C., there was no obligation on the bank ever to advance a shilling. In the present case when the charge was executed there was an existing agreement to make an advance of 3000*l.*, and a guarantee of that amount by the solicitor. As Rigby L.J. said in *In re Bircham* (2), the substance of the transaction must be looked to, and in substance there was in this case on November 18, 1909, a completed mortgage for 3000*l.* This is not affected by the actual advance being postponed at the request of the mortgagor so that he might have to pay less in the shape of interest and bank charges. [He also referred to *In re Lacey & Son.* (3)]

R. M. Pattisson, for the respondent. The transaction in this case is outside the scale.

In the first place, the scale does not apply in the case of an equitable mortgage, at any rate where the memorandum of charge contains an agreement by the mortgagor to execute a legal mortgage.

Secondly, the scale only applies where the transaction has been completed by payment of the money. Here the 3000*l.* was not advanced when the memorandum of charge was executed, so that there was no completed mortgage transaction.

Thirdly, the scale does not apply where the mortgage, as in this case, is to secure something which is uncertain in amount. Moreover, the Court has to look at the facts as they existed when the mortgage was executed or very shortly afterwards, and cannot disregard the form of the transaction.

PARKER J. This is a summons to vary a taxing Master's certificate, and, so far as the points which I am required to deal

(1) [1895] 2 Ch. 786. (2) [1895] 2 Ch. 799.
(3) (1883) 25 Ch. D. 301.

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with are concerned, the contention of the applicant is that the taxing Master has been wrong in his decision that the scale fee is not applicable to a transaction which I shall presently describe. In my opinion, the taxing Master was wrong, and the scale fee is applicable to that transaction.

The General Order under the Solicitors' Remuneration Act, 1881, provides that with regard to mortgages the following fees are to be payable:—"Mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage, and completing"—certain sums specified. "Mortgagee's solicitor for negotiating loan"—certain other sums specified. "Do., do., for investigating title to freehold, copyhold, or leasehold property; and preparing and completing mortgage"—again certain sums are mentioned in the Order.

Now the transaction in question, which is said to be outside that scale, is a transaction the facts of which I find, on the evidence before me, to be shortly as follows. In 1909, the client, being in need of money, instructed his solicitor to apply to a bank for a loan of 3000*l.*, of a temporary nature, to be secured by the deposit of a memorandum of charge upon certain property belonging to the client, and the solicitor accordingly did apply to the bank for the 3000*l.* upon that security, and the bank made it a condition of making the advance that the solicitor should, on behalf of the bank, investigate the title and advise them that it was one upon which they could properly advance the 3000*l.*, and that the solicitor should himself give a guarantee for the repayment of the 3000*l.*, when lent, within a certain time. The solicitor did give the guarantee, and he also advised the bank as to the title, and he carried the transaction through, on behalf of the bank and his client, in the following manner—that is to say, the deeds were deposited, a memorandum of charge was executed, and nothing remained to be done except to advance the 3000*l.*, which was to be put, according to the original arrangement, in the joint names of the solicitor and the client. The client thereupon suggested that there was no need to advance the whole sum at once, which would have saddled him with interest and bankers' charges on the whole amount, but that the better plan was that the money should be advanced as and when required;

and, in accordance with that suggestion, the bank, instead of crediting the whole amount to the joint account, opened an account and allowed the client to draw upon it, and, as far as I can make out from the account, from November 18, 1909, when the memorandum was executed, to February 8, 1910, the whole of the 3000*l.* was advanced with the exception of 11*s.* 11*d.*—I cannot trace the 11*s.* 11*d.* in the account. The form which the security took was not that of a charge of any definite amount, but followed the usual practice of bankers and was for any sum which might from time to time be due—for an uncertain amount—but that is a pure matter of the form which the charge took, and had nothing to do with the bargain or the intention of the parties, or the nature of the transaction itself.

Now it is said, on various grounds, that that transaction so carried out is not within the scale. First of all, it is suggested that an equitable mortgage—at any rate where it is not under seal and contains an agreement to execute a further and legal mortgage—is not within the scale at all. In my opinion, that contention cannot be upheld. It appears to me that whether the instructions to the solicitor are to obtain money on a legal mortgage, or on an equitable mortgage, or on a simple memorandum of charge, in each case there is a mortgage, though in some or one of those cases some question may arise, under particular circumstances, whether they fall within the scale, for another reason, namely, that part of the work which the scale contemplates will be done has not been done. That might be so in the case of a charge simply by way of memorandum of deposit.

Next, it is said that the scale only applies to transactions which have been "completed"; and no doubt that is so, and the question in every case is whether, in fact and in substance, the transaction as to which the doubt arises was or was not completed. In the present case it is said that the transaction was not "completed," within the meaning of that word as used in the scale and the Order, because the whole sum of 3000*l.* was not advanced upon November 18, 1909, but was advanced, with the possible exception of the 11*s.* 11*d.* to which I have referred, only

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at subsequent dates. I am of opinion that, where the nature of the transaction is an agreement for a loan payable in præsenti, upon certain securities, guaranteed by the solicitor, it is a completed transaction if in fact, within a reasonable time after the date of the actual signing of the memorandum, the sums are actually advanced—more especially where, as in this case, it is purely in the interests and at the request of the client that the making of the advance is withheld in order to save him interest and bankers' charges.

Then it is said that the authorities shew that where a mortgage is given to secure money which may or may not be advanced, at the option of the lender, and which is entirely uncertain in amount, the transaction is not one which comes within the scale; and I think the authorities do point to that conclusion. At the same time it appears to me that in the present case none of the difficulties mentioned in those authorities with regard to the application of the scale are relevant, because the amount was a certain amount, there was an actual agreement for its advance, and it would have been made at once but for the express request of the client that the sum should be held back in order to save him interest and bankers' charges.

Lastly, it is said that I cannot go into the substance of the transaction, but am tied down by the form which it took, that is to say, a memorandum of deposit embodying the usual bankers' charge and not specifying any particular sum. Again I do not think that that is so. I think that under the Order and the scale I am entitled to look at the substance of the transaction, and the substance of this transaction certainly was that the loan should be a loan of a definite amount, advanced on the completion of the transaction, that is to say, on the signing of the memorandum of charge. As I have already said, that money would have been then advanced but for the express request of the client made in order to avoid more interest and bankers' charges than were absolutely necessary.

When I come to test the applicability of the scale by considering whether the work specified in the schedule has been actually done, it appears to me that the work has been actually done. No doubt, in the present case, the solicitor has, as the

mortgagor's solicitor, deduced the title and has perused the mortgage—treating the mortgage simply as the instrument conferring the charge—and he has seen to the completion of the transaction by the execution of the memorandum; and again, as the mortgagee's solicitor, it appears to me that he has investigated the title to the mortgaged property on behalf of the mortgagee, and that he has prepared and completed the instrument creating the charge or mortgage. There does not seem to me to be anything mentioned in the scale of charges in the nature of work which the solicitor has not done.

My attention has been called to certain remarks of the taxing Master, in which he says that no abstract of title was prepared. That may or may not have been so; I cannot find any evidence that it was so, but even if it was, it does not appear to me that that prevents the solicitor having investigated the title within the meaning of the Order. And it is also said that he did not call more than once on the persons who actually had the custody of the deeds. I suppose the innuendo in that statement is that the solicitor did not do what he ought to have done in the matter. I have no evidence that he did not properly investigate the title. It is quite possible that he had abstracts in his own possession. It is quite possible that he had copies of the deeds, so that it was unnecessary to make more than one call to look at the deeds themselves. It is suggested also that the manager of the bank made certain notes on the document as to title. That, again, may have been so, though I do not know that there is any strict evidence of that, or of the circumstances under which, if he did it, the notes were taken. But it is impossible for me on that to draw the conclusion that the solicitor absolutely and entirely neglected to do what he was employed to do by the bank, namely, to investigate the title on their behalf, and I decline to draw that inference, especially after the affidavit of the bank manager in which he says that the bank accepted the title and completed the transaction on the advice of the solicitor.

It appears to me, under all the circumstances of the case, that the scale fees are payable, and that there is nothing in the authorities to prevent me from looking at the substance of the

PARKER J. 1912 BAKER, *In re.*

transaction, or from saying that there was a mortgage, and a completed mortgage, within the meaning of the Order.

Solicitor for applicant: *G. W. Grice-Hutchinson.*
Solicitors for respondent: *Crossfield, Cushing & Wheldon.*

F. E.

PARKER J. 1912 *July* 10, 31.

SINNOTT *v.* BOWDEN.

[1911 S. 1697.]

Insurance (Fire) — Mortgagee of House destroyed by Fire — Right to have Insurance Money applied in Rebuilding — Priority over Rights of Garnishor—Insurance "effected under the mortgage deed"—Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 83—*Conveyancing and Law of Property Act*, 1881 (44 *& 45 Vict. c.* 41), *s.* 23, *sub-s.* 3.

By a deed executed in November, 1911, B. charged a house in Walthamstow with payment to C. of a sum of money and covenanted to insure and keep insured the mortgaged property against fire in a certain amount. Prior to the charge the property had been insured by B. under an annual policy expiring at Christmas, and after the date of the charge B. renewed the policy for the ensuing year. In February, 1912, the house was destroyed by fire, and in May, 1912, S., a judgment creditor of B., obtained a garnishee order nisi attaching the money due under the policy. After the date of the order C. served the insurance company with notice that he required the money to be applied in rebuilding the house, and at the hearing of an application to make the order absolute his counsel insisted on this being done:—

Held, (1.), following *Ex parte Gorely* (1864) 4 D. J. & S. 477, that s. 83 of the Fires Prevention (Metropolis) Act, 1774, giving interested persons the right to have insurance moneys expended in rebuilding, was of general as opposed to local application; (2.) that, notwithstanding the doubt expressed by Lord Selborne in *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888) 13 App. Cas. 699, 714, the same section applied so as to enable a mortgagee to require the money to be expended in rebuilding; (3.) that the policy was, within the meaning of s. 23, sub-s. 3, of the Conveyancing Act, 1881, "effected under the mortgage deed," and, therefore, C. had a similar right under that provision; and (4.) that the mortgagee's rights were not displaced by the garnishee order nisi.

By an indenture dated November 3, 1911, Mr. J. W. Bowden charged Nos. 41, 43, and 45, Worcester Road, Walthamstow, with

payment to G. J. Clarke of a sum of 30*l.*, by instalments as therein mentioned, and covenanted to insure the premises and keep the same insured in not less than three-fourths of their value. The charge was expressed to be subject to a first mortgage in favour of William Sinnott, but before November 3, 1911, Bowden had contracted to convey to Sinnott the equity of redemption in Nos. 41 and 43 in consideration of Sinnott releasing No. 45 from the mortgage. This contract was subsequently enforced by the Court, so that the charge in Clarke's favour became a first charge, but on No. 45 only. No. 45, Worcester Road consisted of a cottage with a shed in the rear thereof, and had, before November 3, 1911, been insured with the London Assurance Corporation to the extent of 190*l.*, the contents of the shed being by the same policy insured to the extent of 10*l.* The policy was an annual policy expiring at Christmas, and was, after the date of Clarke's charge, renewed by Bowden for the ensuing year.

On February 22, 1912, the cottage and shed and their contents were destroyed by fire, and the amount payable by the insurance company was subsequently agreed at 108*l.* 15*s.*, the greater portion of which was for damage to the cottage and shed. On May 8, 1912, Sinnott, as judgment creditor of Bowden, obtained a garnishee order nisi attaching the money due from the insurance company to Bowden under the policy. On May 12, 1912, Clarke served the insurance company with a notice requiring the money to be applied in rebuilding the house. Sinnott applied to the Court to have the order nisi made absolute, but the application was opposed by Clarke, and also by Skipper, a subsequent mortgagee under an indenture dated February 16, 1912, which also contained a covenant on the part of Bowden, the mortgagor, to insure the premises against fire.

The case was argued before Parker J. on July 10, 1912.

James Whitehead, for Clarke, the first mortgagee. The interest of the mortgagees in the policy moneys has priority over that of the garnishor, for the former can insist, either under s. 83 of the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), or under s. 23, sub-s. 3, of the Conveyancing Act, 1881 (44 & 45 Vict.

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c. 41), on the moneys, or so much as represented the mortgaged property, being applied in or towards rebuilding the property. Sect. 83 of the former Act provides that "in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered," insurance offices shall be "authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses, or other buildings," which may be "burnt down, demolished, or damaged by fire . . . . to cause the insurance money to be laid out and expended, so far as the same will go, towards rebuilding, reinstating, or repairing" the destroyed or damaged buildings, unless the security referred to in the section is given, "or unless the said insurance money shall be in that time"—sixty days after the claim is adjusted—"settled and disposed of to and amongst all the contending parties to the satisfaction" of the insurance office.

That section has been held to be applicable to the whole kingdom: *Ex parte Gorely* (1); *In re Quicke's Trusts.* (2)

It is contended that, notwithstanding the doubt expressed by Lord Selborne in *Westminster Fire Office* v. *Glasgow Provident Investment Society* (3), the section applies as between mortgagor and mortgagee, and that the mortgagees in this case are "persons interested" within the meaning of the section. Their statutory rights existed at least as from the time when the fire took place, and they have priority over any rights of the garnishor. A garnishee order only affects such property of the debtor as he could deal with properly and without violation of the rights of others, whether the garnishor had notice of those rights or not: *Badeley* v. *Consolidated Bank.* (4)

If the Act of 1774 is not applicable, the mortgagees obtain priority by s. 23, sub-s. 3, of the Conveyancing Act, 1881, which provides that "all money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so

(1) 4 D. J. & S. 477; 34 L. J. (Bk.) 1.
(2) [1908] 1 Ch. 887.
(3) 13 App. Cas. 699, 714.
(4) (1888) 38 Ch. D. 238.

requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received."

Ashton Cross, for Skipper, the second mortgagee, adopted the argument on behalf of Clarke.

Morton Smith, for Sinnott, the garnishor. The policy was taken out in 1909, before either of the mortgages was executed, and was not therefore an "insurance effected under the mortgage deed" within the meaning of s. 23, sub-s. 3, of the Conveyancing Act, 1881.

The policy also included certain trade fixtures and stock which were not comprised in the mortgage. At any rate the insurance money for the fixtures and stock cannot belong to the mortgagees, and it is contended that they are not entitled to have the rest of the money applied in rebuilding.

The crucial date is May 8, 1912, when the garnishee order nisi was made. Up to that time the mortgagor was entitled to receive the money, and the garnishor then stood in his shoes: see the judgment of Lord Coleridge C.J. in *Davis* v. *Freethy* (1), citing the decision of Chitty J. in *In re General Horticultural Co.* (2)

The position of the garnishor when the garnishee order nisi was made is stated by James L.J. in *Ex parte Joselyne.* (3)

[PARKER J. Is not that inconsistent with *In re Combined Weighing and Advertising Machine Co.* (4)?

Whitehead referred to *Norton* v. *Yates.* (5)]

Norton v. *Yates* (5) was the case of a debenture-holder claiming priority over the garnishor.

Apart from statute or special contract, a mortgagee has no interest in the moneys payable under a policy effected by the mortgagor: *Lees* v. *Whiteley* (6); *Rayner* v. *Preston.* (7)

Assuming these mortgagees were "persons interested" within the meaning of s. 83 of the Act 14 Geo. 3, they were not entitled to the benefit of the section until they had made a distinct request to the insurance company to apply the money in rebuilding: *Simpson* v. *Scottish Union Insurance Co.* (8) No such request,

(1) (1890) 24 Q. B. D. 519, 522.
(2) (1886) 32 Ch. D. 512.
(3) (1878) 8 Ch. D. 327, 330.
(4) (1889) 43 Ch. D. 99.
(5) [1906] 1 K. B. 112.
(6) (1866) L. R. 2 Eq. 143.
(7) (1881) 18 Ch. D. 1.
(8) (1863) 1 H. & M. 618.

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if made at all, was made before the garnishee order nisi was obtained. But it is by no means clear that the mortgagees were persons interested. In *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1) Lord Selborne, referring to s. 83, said: "It has not, as far as I know, ever been decided that it applies as between mortgagor and mortgagee, or (which is the same thing in effect) as between prior and puisne incumbrancers. The concluding words of the section are sufficient, at least, to suggest grave doubts whether it ought to be so applied." [He also referred to *Castellain* v. *Preston*. (2)]

Whitehead in reply. Sect. 23, sub-s. 3, of the Conveyancing Act, 1881, does not specify any time within which the requirement as to rebuilding is to be made, and I can make it now, and do so.

Norton v. *Yates* (3) is a clear decision that any notice required to complete the mortgagee's title can be given after the making of the garnishee order nisi.

As to s. 83 of the Act of 1774, the decision in *Ex parte Gorely* (4) is binding on the Court and seems to assume that the section applies for the benefit of mortgagees. [He also referred to *Cairney* v. *Back*. (5)]

F. B. Dutton, for the London Assurance Corporation.

Cur. adv. vult.

July 31. PARKER J. By an indenture dated November 3, 1911, Bowden charged Nos. 41, 43, and 45, Worcester Road, Walthamstow, with payment to Clarke of a sum of 30*l*., by instalments as therein mentioned, and covenanted to insure the premises and keep the same insured in not less than three-fourths of their value. The charge was expressed to be subject to a prior mortgage in favour of Sinnott, but it appears that before November 3, 1911, Bowden had contracted to convey to Sinnott the equity of redemption in Nos. 41 and 43 in consideration of Sinnott releasing No. 45 from the mortgage. This contract was subsequently enforced by the Court, so that the charge in Clarke's favour became a first charge, but on No. 45 only.

(1) 13 App. Cas. 699, 714.
(2) (1883) 11 Q. B. D. 380.
(3) [1906] 1 K. B. 112.
(4) 4 D. J. & S. 477; 34 L. J. (Bk.) 1.
(5) [1906] 2 K. B. 746.

The premises known as No. 45, Worcester Road consisted of a cottage with a shed in the rear thereof, and had prior to November 3, 1911, been insured with the London Assurance Corporation to the extent of 190*l.*, the contents of the shed being by the same policy insured to the extent of 10*l.* The policy was an annual policy expiring at Christmas, and was, after the date of Clarke's charge, renewed by Bowden for the ensuing year.

On February 22, 1912, the premises were destroyed by fire, and the amount payable by the insurance company was subsequently agreed at 108*l.* 15*s.*, the greater portion of which must have been for damage to the cottage and shed.

On May 8, 1912, Sinnott, as judgment creditor of Bowden, obtained a garnishee order nisi attaching the moneys due from the insurance company to Bowden under the policy. He is now applying to have the order nisi made absolute, but the application is opposed by Clarke, and also by Skipper, a subsequent mortgagee under an indenture dated February 16, 1912, which also contained a covenant on the part of Bowden, the mortgagor, to insure the premises against fire.

The question I have to decide is whether either of these gentlemen has any interest in the policy moneys which overrides the interest of the garnishor.

It is, I think, clear that, apart from special contract or the provisions of some statute, a mortgagee has no interest in the moneys payable under a policy of insurance effected by a mortgagor on the mortgaged premises: see *Lees* v. *Whiteley* (1); *Poole* v. *Adams* (2); *Rayner* v. *Preston.* (3)

In the present case there is no special contract, but each of the mortgagees relies on the provisions of s. 83 of 14 Geo. 3, c. 78, and also on the provisions of s. 23, sub-s. 3, of the Conveyancing Act, 1881. With regard to s. 83 of 14 Geo. 3, c. 78, I think that, notwithstanding the doubt expressed in *Westminster Fire Office* v. *Glasgow Provident Investment Society* (4), I am clearly bound by the case of *In re Gorely* (5), to hold that the section is of general as opposed to local application. It has,

(1) L. R. 2 Eq. 143.
(2) (1864) 12 W. R. 683.
(3) 18 Ch. D. 1.
(4) 13 App. Cas. 699.
(5) 4 D. J. & S. 477; 34 L. J. (Bk.) 1.

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however, never been actually decided whether the section has any application as between mortgagor and mortgagee, though prior to the case of *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1) it was, I think, generally assumed that it had. But in that case Lord Selborne suggested there might be some difficulty in so holding, because of the concluding words of the section. I am not quite sure that I follow this suggestion. The words in question exempt the insurance company from having to lay out or take security for the laying out of the policy moneys in rebuilding the insured premises if, within sixty days, those moneys shall have been settled and disposed of to and amongst all "the contending parties" to the satisfaction and approval of the insurance company. If "the contending parties" means the parties claiming to be interested in the policy moneys the clause may possibly appear to suggest that no one except the persons so interested has any right to require the policy moneys to be laid out in rebuilding; but, as a matter of fact, this right is expressly given, not to the persons interested in the policy moneys, but to the persons interested in the premises destroyed by fire, and I can see no reason why "the contending parties" should not include the persons who, though not interested in the policy moneys, are interested in the subject-matter of the insurance and are insisting on the insurance money being laid out in rebuilding. This construction seems to me in full accordance with the general object of the enactment, which is to deter fraudulent people from arson, and not to provide a solution of difficulties arising out of rival claims to the policy moneys.

I have come to the conclusion therefore—though, having regard to Lord Selborne's suggestion, with great hesitation—that both Clarke and Skipper are, unless their rights have been displaced by the order nisi, entitled under the statute in question to require the insurance moneys attributable to the cottage and shed to be laid out in rebuilding those premises. Each of them by his counsel has insisted that this should be done, and Clarke served the insurance company with notice to that effect on May 30, 1912.

I am further of opinion that Clarke, at any rate, has a similar right under s. 23, sub-s. 3, of the Conveyancing Act, 1881. That

(1) 13 App. Cas. 699.

sub-section provides that all moneys received on an insurance effected under the mortgage deed or under the Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the damage or loss in respect of which the money is received. I am of opinion that the policy in question was, within the meaning of this sub-section, effected under the mortgage deed. It is true it existed at the date of the mortgage deed, but it was subsequently renewed, and could have been relied on by the mortgagor as a compliance or partial compliance with his covenant to insure. Further, I do not think that a mortgagor can get rid of the right of the mortgagee under this section by himself parting with the right to receive the money.

The only remaining question is whether the rights of the mortgagees have been displaced by the garnishee order nisi. In my opinion they have not. It appears from the cases of *Evans* v. *Rival Granite Quarries, Ld.* (1), *Cairney* v. *Back* (2), and *Norton* v. *Yates* (3) that the equitable rights of the holder of a floating charge will not be displaced by a garnishee order, even when made absolute, if before actual payment the charge crystallizes and the holder applies for relief. It appears to me that the principle of those cases must, a fortiori, apply to a right conferred by statute.

I hold, therefore, that the policy moneys, so far as attributable to the mortgaged cottage and shed, cannot be attached in the face of opposition from the mortgagees. So far as they are attributable to the contents of the shed the order must, however, be made absolute. Unless the parties can agree as to the amounts attributable to the cottage and shed on the one hand, and the contents of the shed on the other, I must direct an inquiry or adjourn for further evidence.

Solicitors for Clarke: *Shaen, Roscoe, Massey & Co.*

Solicitors for Skipper: *Skipper & Co.*

Solicitors for Sinnott: *Taylor & Taylor, for J. Sinnott & Son, Bristol.*

Solicitors for the insurance company: *Dawes & Sons.*

(1) [1910] 2 K. B. 979. (2) [1906] 2 K. B. 746.
(3) [1906] 1 K. B. 112.

JOYCE J.
1912
April 23;
May 24.

In re LEACH.
LEACH *v.* LEACH.

[1911 L. 2192.]

Will — Construction — Equitable Limitations — Fee Simple determinable on Bankruptcy, &c.—Executory Devise—"Male heir of the body"—Failure of Issue.

Testator appointed trustees and executors of his will and devised certain real estate upon trust to pay the annual income arising therefrom unto his nephew, the plaintiff, until he should assign, charge, or otherwise dispose of the same or become bankrupt, which of the said events should first happen, and if the trusts thereinbefore declared should determine in the lifetime of the plaintiff to accumulate at compound interest for the benefit of the male heir of his body till he attained the age of twenty-one years, and should he die without leaving a male heir, then the testator directed his trustees to apply the annual income to the plaintiff's brothers and the respective male heirs of their bodies successively according to seniority in tail, with remainder to the plaintiff's sisters as tenants in common.

Upon a summons by the plaintiff, to which the remaindermen, the plaintiff's infant son, and the heiress-at-law of the testator were defendants, for the determination of the quantum of the estate taken by him:—

Held, but without prejudice to any claim which after the plaintiff's death his heir male or the heir male of his body might make, that the plaintiff took an equitable estate in fee simple determinable on the happening of any of the specified events, which estate would on his death without the happening of any of those events become an absolute estate in fee simple, but subject to the executory limitations over to the remaindermen if the plaintiff should die without leaving any male heir of his body at the time of his decease.

ADJOURNED SUMMONS.

By his will the testator appointed his nephew, the plaintiff Robert Leach, and the defendants William Barnes Leach and Francis James Leach executors and trustees and made the following disposition of his real estate:—"I devise and bequeath the manor or lordship of Martock with the appurtenances thereof and the chief quit and lords rents payable in respect of the same and also all other my freehold and leasehold messuages or dwelling houses and lands of any other holding also my freehold tithes rent charges upon the trusts hereinafter mentioned

namely upon trust to pay the rents produce and annual income arising therefrom hereinafter called 'the annual income' unto my nephew Robert Leach" the plaintiff "until he shall assign charge or otherwise dispose of the same or some part thereof or become bankrupt or compound or make any arrangement with his creditors borrow money or do something whereby the said annual income or some part thereof would become payable to or vested in some other person which of the said events shall first happen and if the trusts hereinbefore declared shall determine in the lifetime of the said Robert Leach to accumulate at compound interest for the benefit of the male heir of his body till he attains the age of twenty-one years and should he die without leaving a male heir then I direct my trustees to apply the annual income to my nephews William Barnes Leach Francis James Leach and Henry Devenish Leach and the respective male heirs of their bodies successively according to seniority of such nephews entail so that the interest of each nephew shall in the event of his death without male issue or leaving male issue who shall die under the age of twenty-one years be diverted and go to his next eldest brother and his male issue but in the event of all these last mentioned nephews dying without leaving male issue or leaving male issue such issue shall die under the age of twenty-one years then I direct my trustees to convey and assure my said trust estate unto and equally between my nieces Mary Louisa Leach and Christine Eleanor Leach as tenants in common." There was a subsequent direction in the will that the powers conferred by s. 37 of the Settled Land Act, 1882, might be exercised by any tenant for life in possession without an order of the Court.

The testator made three codicils to his will, of which the second, appointing the defendant Mary Louisa Oliver (then M. L. Leach) an additional executor and trustee of his will, was alone material for the purposes of this report.

The testator died on October 13, 1906, and his will and codicils were duly proved by the defendants W. B. Leach and Mary L. Oliver. There were no leaseholds affected by the above-mentioned gift.

Robert Leach took out this summons (to which his brothers

JOYCE J. 1912 LEACH, *In re.* LEACH *v.* LEACH.

William Barnes Leach, Francis James Leach, and Henry Devenish Leach, his sisters Mary Louisa Oliver and Christine Eleanor Leach, his infant son, and the heiress-at-law of the testator were defendants) for, inter alia, a declaration that the plaintiff was legally or in the alternative equitably entitled to the devised realty for an estate in fee simple subject only to an executory gift over in the event of his not having any male heir of his body who should survive him or attain the age of twenty-one years in his lifetime.

J. G. Wood, for the plaintiff. The question is what estate the plaintiff takes under the devise. The words "should he die without leaving a male heir" in relation to freeholds give the plaintiff an estate tail. "Male heir" must mean "heir of the body," otherwise it would be meaningless in view of the subsequent gift over to a cousin: Theobald on Wills, 7th ed. p. 406. That being so, s. 29 of the Wills Act does not apply: *Dawson* v. *Small* (1); Theobald on Wills, 7th ed. p. 709. The words import an indefinite failure of heirs male of the body, and that confers an estate tail: *Forth* v. *Chapman*. (2) The old cases before the Wills Act apply a fortiori to the present case, for in them there were the ambiguous words "die without leaving issue," which were construed as meaning "heirs of the body" and as conferring an estate tail, but here there is no ambiguity, for in this case those are the very words used: *Porter* v. *Bradley* (3); *Crooke* v. *De Vandes* (4); *Cole* v. *Goble*. (5)

Whatever may be the effect of the provision as to a charge, assignments, or bankruptcy, the plaintiff will be content if the Court holds him to be entitled to an estate tail.

Owen Thompson, for the defendants the brothers and sisters of the plaintiff. The cases cited are cases where there was a gift in fee or for life in the first instance and do not apply to a case like this. The plaintiff takes an interest determinable on any of the specified events. The limitation may be conterminous with his life, but it is not a life estate. On the happening of any of

(1) (1874) L. R. 9 Ch. 651.
(2) (1719) 1 P. Wms. 663.
(3) (1789) 3 T. R. 143, 146.
(4) (1803) 9 Ves. 197.
(5) (1853) 13 C. B. 445, 454.

the specified events, there is a direction to accumulate until the male heir of his body attains twenty-one, but there is no gift to such male heir. There is no clear gift to the plaintiff in fee or for life followed by a gift over in default of issue, and if the plaintiff die without leaving a male heir of his body, then these defendants take. In this will there is a certain punctum temporis when an event happens or may happen, and that is enough to take this out of the cases cited on behalf of the plaintiff: *Coltsmann* v. *Coltsmann.* (1)

E. F. Spence, for the infant defendant. The heir male takes the fee when the plaintiff dies. The trust for accumulation and the gift over if there is no male heir shew that the testator intended the heir male to take the fee, and a son or grandson in existence at the plaintiff's death will take.

Popham, for the heiress-at-law of the testator. The gift to the plaintiff is a determinable estate for life and is not a fee simple. In a subsequent part of the will the testator speaks of a tenant for life in possession, pointing, as I submit, to the fact that he had made the plaintiff a tenant for life. There is no gift in the will in the event of the plaintiff dying and leaving a male heir, and in that event there is an intestacy. If he dies without leaving a male heir, then the gift over takes effect, the failure meaning a failure at his death: *Ex parte Davies* (2); *Parker* v. *Birks.* (3)

J. G. Wood in reply. There is no necessity for a clear life estate in the first instance in order to support an estate tail by implication. This is a branch of *Shelley's Case* (4), and dower trusts to which that rule is applied are an instance where there is not a clear life estate. Again, an estate to a woman durante viduitate with remainder to the heirs of her body gives her an estate tail. In *Coltsmann* v. *Coltsmann* (1) there was a clear gift of the fee, and the words "at my son's death" shewed that it was not an indefinite failure of issue.

Cur. adv. vult.

May 24. JOYCE J. This is a summons with respect to the construction of a will not drawn by a lawyer but by the testator

(1) (1868) L. R. 3 H. L. 121.
(2) (1851) 2 Sim. (N.S.) 114.
(3) (1854) 1 K. & J. 156.
(4) (1579) 1 Rep. 93b.

JOYCE J. 1912 LEACH, *In re.* LEACH v. LEACH.

himself, who apparently considered that he had sufficient knowledge for the purpose. The limitations in question, omitting superfluous words, may be thus briefly stated: "I devise the manor of Martock, &c., and all other my freeholds upon trust to pay the rents and annual income unto my nephew Robert, until he shall assign, charge or otherwise dispose of the same or some part thereof or become bankrupt, &c., which of the said events shall first happen, and if the trusts hereinbefore declared shall determine in the lifetime of the said Robert to accumulate at compound interest for the benefit of the male heir of his body till he attains the age of twenty-one years, and should he die without leaving a male heir then I direct my trustees to apply the annual income to my nephews William, Francis, and Henry, and the respective male heirs of their bodies successively," and so on.

The summons asks to have it declared that upon the true construction of the will the plaintiff—that is Robert—is legally or in the alternative equitably entitled to the property I have mentioned for an estate in fee simple. At the Bar, however, counsel for the applicant, having no doubt well weighed and bearing in mind the provisions of s. 15 of the Fines and Recoveries Act, 1833, threw over what I may call the fee simple theory, and asked to have it declared that the applicant was tenant in tail.

Now, inasmuch as while Robert lives no one can say who will be his male heir or the male heir of his body when he dies, and no order I may now make can bind such male heir or male heir of his body as to any estate by purchase which he may, according to the true construction of the limitations, take upon the death of Robert, therefore, in order to avoid any error or misapprehension, I think that whatever order I may make should be expressed to be without prejudice to any claim of the person who may be male heir or male heir of the body of Robert at the time of his death to an estate by purchase under the limitations.

Returning to the limitations, and pausing at the words "which of the said events shall first happen" (and for the moment neglecting what follows), I consider it to be clear that Robert takes in Martock and the freeholds an equitable fee

simple qualified or determinable similar to the first estate which the intended husband ordinarily takes in a settlement on marriage of his real estate. I refer to the limitation to the use of or upon trust for the intended husband, his heirs and assigns, until the intended marriage be solemnized, and from and after the solemnization thereof to the uses and upon the trusts afterwards expressed, whatever they may be. This limitation to Robert of a determinable fee simple appears to me to be free from objection in every respect, notwithstanding what may have been said in any book as to the effect of the Statute of Quia Emptores upon the creation of estates in fee simple determinable or qualified. Upon this part of the case I may refer to p. 114 of Lewin on Trusts, 12th ed., and pp. 61 and 192 of Goodeve's Law of Real Property, 5th ed., and there are other authorities.

If and when Robert assigns, charges, or becomes bankrupt, which event, of course, if it happens at all, must be during his life, the estate limited to him will of itself cease or determine; he will have no further interest in the premises and the trust to accumulate will arise. If, however, Robert dies without assigning, charging, or becoming bankrupt, &c., then the event expressed for the determination of his estate never can arise, and his estate in fee simple becomes absolute (see Preston on Estates, vol. i. p. 440), subject nevertheless to the effect, whatever it may be, of the subsequent limitations to arise in the event of his dying without leaving a male heir, whatever may be the true construction of that expression.

Now for various reasons I am of opinion, and indeed in the argument before me I think every one agreed, that the term "male heir" in the clause "and should he die without leaving a male heir" &c. must be read as equivalent to and meaning "male heir of his body." So also I think every one agreed that the "male heir of his body" in the clause directing accumulation must be the male heir of the body of Robert at the time of his death.

The real, if not the only, difficulty in the present case to my mind is that of determining whether the phrase "should he die without leaving a male heir" is to be read literally as referring only to a failure of male heirs of the body of Robert at the time

JOYCE J. 1912 LEACH, *In re.* LEACH *v.* LEACH.

of his death, or as referring to an indefinite failure—a failure at any time of male heirs of the body of Robert. If the latter, the estate which Robert would otherwise have taken in fee simple is cut down to an estate in tail male, whether determinable or not. The 29th section of the Wills Act has no application to such a case as the present: *Dawson* v. *Small* (1); and the general rule no doubt before the Wills Act was, and probably still is, that in relation to real estate the words "die without leaving issue" are equivalent to "die without issue," and import a failure of issue at the death of the person whose issue are spoken of, or at any time afterwards, unless an intention appears to the contrary: see Hawkins on Wills, p. 213. But this rule will yield to a clear manifestation in the context of the testator's intention to use the phrase "die without leaving issue" or "without leaving a male heir of the body" in the restricted and, I think I may say, its natural sense of dying without leaving issue, or without leaving a male heir of the body living at the death of the person whose issue or male heir of the body is spoken of. Here the expression "male heir of the body" where it occurs in the trust for accumulation must, as I have said, mean the male heir of the body of Robert at the time of his decease, and I think that the male heir or male heir of the body in the next succeeding clause "and should he die without leaving a male heir" refers to the same person and has the same signification. This consideration, coupled with the circumstance that the expression used is not "die without having" but "die without leaving a male heir," brings me to the conclusion that in accordance with the spirit—though it may not be required by the words—of s. 29 of the Wills Act the phrase "die without leaving a male heir" (or male heir of the body) is here used in the literal and primary sense of the words, and that it is a failure at the death, and not an indefinite failure, of male heirs of the body that is referred to, so that the fee simple estate which Robert would otherwise take is not in my opinion cut down to an estate in tail male by the clause or limitation commencing with the words "and should he die without leaving a male heir."

Upon the whole I think that what Robert takes is an equitable

(1) L. R. 9 Ch. 651.

estate in fee simple—qualified, being determinable during his life by his assigning, charging, or becoming bankrupt, &c., and if he dies without assigning, charging, or becoming bankrupt, &c.—absolute, but nevertheless subject to the executory limitation over to the nephews, William, Francis, and Henry, in the event of Robert dying without leaving a male heir of his body at the time of his death.

If by reason of Robert's assigning, charging, or becoming bankrupt, &c., the trust for accumulation comes into operation, the estate of Robert having absolutely determined, then, as it appears to me, until it be seen whether Robert leaves a male heir of his body or not, it will remain uncertain what is to become of the accumulations, as also what is to become of the land itself, on the death of Robert.

If Robert does leave a male heir of his body, the limitation over to the nephews, William, Francis, and Henry, does not arise, and cannot take effect, and it is just possible that the male heir of the body of Robert may dispute the claim of the testator's own heir. Now I do not know whether it has much to do with it, but in Leake on the Law of Property in Land, 2nd ed. p. 138, there is a passage which suggests to me an argument for the case of the male heir.

In other words, I think that what Robert takes is an equitable estate in fee simple, determinable in the event of his assigning, charging, or becoming bankrupt, &c., which estate, if he dies without assigning, charging, or becoming bankrupt, &c., becomes an ordinary estate in fee simple, but subject to the executory limitation over to the testator's nephews in the event of Robert dying without leaving any male heir of his body at the time of his decease. I will make a declaration to that effect, but it must be without prejudice to any claim which after Robert's death his male heir or the male heir of his body living at his death may make.

Solicitors: *Newman, Paynter & Co.; Moon, Gilks & Moon.*

R. M.

JOYCE J.
1912
July 24, 26, 30, 31.

In re WATKINS.
MAYBERY *v.* LIGHTFOOT.

[1910 W. 3068.]

Will—Construction—Realty—Devise—Life Estate—Remainder to "my nearest male heir"—"My nearest and eldest male relative"—No Male Heir—Heiress-at-Law—Intestacy.

The testator, a bachelor, devised real estate to a trustee and his heirs in trust to pay the rents and profits to H. H. M. for life and after his decease to convey, assign, and assure the same "unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me then I direct the said" trustee "to convey assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my eldest male relative." The testator bequeathed the residue of his personal estate to his trustee in trust for H. H. M. for life, expressing a desire that he should not mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value "and keeping up the remainder in trust for my nearest and eldest male relative" who should be such at the death of H. H. M.

The defendant Mrs. W. was the heiress-at-law of the testator both at his death and the death of H. H. M.

The nearest male relative of the testator at the time of his death was the son of a female first cousin, and at the time of H. H. M.'s death was the son of a daughter of the same cousin:—

Held, that the person to whom the real estate was to be conveyed on H. H. M.'s death must possess three qualifications, namely, he must be (1.) a male, (2.) testator's heir, and (3.) testator's nearest male heir; that in devising to his nearest male heir the testator could not in the circumstances have contemplated any heir of his own body, and must be taken to have meant his heir general, in which case it was well settled that the gift was a gift to his heir being a male; and that as neither at his death nor at the death of H. H. M. was the testator's heir a male, the devise failed, and the testator's heiress-at-law was entitled.

ADJOURNED SUMMONS.

By his will the testator, T. C. B. Watkins, appointed H. O. A. Maybery his executor and after a specific devise of his Kentish property devised the rest and residue of his real property to H. O. A. Maybery and his heirs "in trust to pay the rents and profits thereof yearly to his brother Herbert Hartland Maybery

for the term of his natural life and from and after his decease to convey assign and assure the same unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me then I direct the said H. O. A. Maybery to convey assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my said eldest male relative." The testator bequeathed the residue of his personal estate to H. O. A. Maybery in trust for Herbert Hartland Maybery for life and then expressed himself as follows: "And I desire the said Herbert Hartland Maybery neither to mortgage nor anticipate in any manner the said annual income whatsoever the amount may be paid into his hands by his said brother H. O. A. Maybery and I confidently expect him to aid and assist his said brother in keeping my real property which I have devised to him for the term of his natural life in fair and tenantable repair such repair as his brother the said H. O. A. Maybery may think necessary for preserving the value of the property and keeping up the remainder in trust for my nearest and eldest male relative who shall be such at the time of the decease of the said Herbert Hartland Maybery."

The testator died on February 23, 1897, a bachelor, and his will was duly proved.

H. O. A. Maybery died on July 30, 1906, and the plaintiff was his sole executrix.

Herbert Hartland Maybery, the tenant for life, died on October 12, 1910.

The testator was the only child of his father, Thomas Watkins, who had four brothers, John, Evan, Lewis, and Roger, all of whom died in the testator's lifetime. John and Roger left no issue.

Evan had one daughter, the defendant Mary J. G. Watkins, the testator's heiress-at-law.

Lewis had three daughters, the eldest of whom (Mrs. Powell Williams) alone had issue one son, Lewis, and three daughters Jane, Mary, and Frances (a spinster), all of whom were defendants. The son, Lewis, died on January 2, 1901, without issue, and the defendant B. E. St. J. P. X. Williams was his legal personal representative, and his three sisters his co-heiresses-at-law, to whom he had by his will devised all the property which

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he might inherit from his mother's family. Jane married H. Le B. Lightfoot and was the mother of the infant defendant David L. Le B. Lightfoot, born on April 3, 1909. Mary married R. J. S. Gill and was the mother of the infant defendant R. J. B. Gill, born on February 12, 1911.

The testator's mother had three sisters only, all of whom died without having had any issue at the date of the testator's death. Both the parents of the testator's mother were then dead.

The plaintiff took out this summons for the determination of the question whether the real estate devised by the testator's will was now held in trust for the infant defendant David L. Le B. Lightfoot in tail general or how otherwise.

The defendants B. E. St. J. P. X. Williams and R. J. B. Gill were dismissed at an early stage of the proceedings on the ground that they could have no possible interest. They were represented by *C. H. Sargant* and *T. A. Nash* respectively.

Tomlin, for the plaintiff, stated the facts.

Hughes, *K.C.*, and *L. F. Potts* (*Davenport* with them), for the infant defendant David L. Le B. Lightfoot. "Nearest male heir" is not used in a technical sense, but means nearest of kin being a male. That this was what the testator meant is borne out by the reference to there being "two or more in equal degrees of consanguinity," which cannot apply to "heir male" used strictly because there cannot be two male heirs in the same degree of consanguinity. The testator himself in the later part of the will shews that by "nearest male heir" he meant his "nearest male relative."

Again, the last clause in the will shews that the gift is to the nearest male relative who was to be ascertained at the death of the tenant for life, for the remainder is to be kept up in trust for his nearest male relative at the time of the decease of H. H. Maybery, the tenant for life; and, also, the conveyance directed by the will must mean a conveyance to some living male person.

This defendant was the testator's nearest male relative at the death of the tenant for life and he takes an estate tail: Hawkins

on Wills, p. 174; *White* v. *Collins* (1); *Chambers* v. *Taylor* (2); *Archer's Case* (3); *Willis* v. *Hiscox.* (4)

Younger, K.C., and *Harman*, for the defendant Mrs. Watkins, the heiress-at-law of the testator. First, there is no nearest male heir who claims at law through males only. Lord Romilly M.R. in *Lywood* v. *Kimber* (5) said that the words "issue male" must be construed in their strict technical sense and meant issue male claiming through males. The gift therefore fails, and there is an intestacy.

Secondly, if we are wrong on our first submission, we say that the person who was nearest male heir at the testator's death took, and that person was Lewis Powell Williams, and he took an estate tail and died without disentailing. So that on either construction there is now an intestacy and this defendant is entitled as heiress-at-law.

Dighton Pollock, for the defendants Mrs. Lightfoot, Mrs. Gill, and Miss Frances Powell Williams. The gift is, subject to H. H. Maybery's life interest, to the nearest male relative at the death of the testator, and that person was Lewis Powell Williams, and I submit that he took the fee simple under the devise and that these three defendants are now entitled.

JOYCE J. In the case of *Dormer* v. *Phillips* (6), where there was a gift with a limitation to the next heir of a living person, the Lord Chancellor, Lord Cranworth, commenced his judgment by observing "that this was one of those unsatisfactory cases in which the Court was called on to say what a testator meant, when it was perfectly clear that he did not know what he meant himself. All that the Court could do was to put a construction on the words actually used," and, dealing in this way with that case, his Lordship, after considering the matter over several times, came to a certain conclusion. Without going so far as to say that in this case it is perfectly clear that the testator did not know what he meant himself, I certainly doubt whether he did.

The limitation in question here is to trustees from and after

(1) (1718) 1 Com. Rep. 289.
(2) (1837) 2 My. & Cr. 376, 387.
(3) (1597) 1 Rep. 66b.
(4) (1838) 4 My. & Cr. 197.
(5) (1860) 29 Beav. 38, 41.
(6) (1855) 4 D. M. & G. 855, 859.

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the decease of Herbert Hartland Maybery to convey, assign, and assure all the testator's freehold and leasehold estate and so on "unto my nearest male heir." It appears to me, therefore, that the person to whom the conveyance is to be made under this limitation must possess three qualifications: (1.) that of being a male; (2.) of being the testator's heir; and (3.) of being the testator's nearest male heir.

As to this word "nearest," which is synonymous with "next," I doubt whether it is more than an epithet, though "next heir" is not uncommon as a term of limitation. In the case I have mentioned of *Dormer* v. *Phillips* (1) the limitation was to the next heir, but that was the next heir of a living person. In *Archer's Case* (2), after a life estate to the testator's son, the devise was to the right and next heir of the same son and to the heirs of his body. In *Winter* v. *Perratt* (3) the limitation was to the first male heir. Strictly speaking, a person cannot have more than one heir. In a case of coparcenary even the coparceners form but one heir. That will be found over and over again in the books, and possibly the latest case in which this is mentioned is *Evans* v. *Evans* (4), where Lindley L.J. in his judgment says: "A man cannot at his decease have more than one heir, for although several females may be co-heiresses, yet they are in point of law only one heir." But in the popular sense a man may have more heirs than one and one may be nearer than another. For instance, suppose a man died who had three sisters and no brother, two of the sisters may be dead having each had issue. The only survivor of such issue in one case may be a son and in the other a grandson. In such a case the heirs of the deceased in the popular sense would be his sister, his nephew, and his great-nephew, the nearest being his sister, and the nearest of the male heirs, if they can be so called, being the nephew; although, as I have said, in legal language there would not be three heirs but one heir.

Now to return to this will. After the limitation to the nearest male heir the testator proceeds: "And should there be two or

(1) 4 D. M. & G. 855.
(2) 1 Rep. 66b.
(3) (1843) 9 Cl. & F. 606.
(4) [1892] 2 Ch. 173, 185.

more"—that is two or more heirs or two or more male heirs—"in equal degree of consanguinity to me then I direct the said Henry Oxenford Aveline Maybery to convey assign and assure the same"—that is the real estate—"unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my said eldest male relative." It is not absolutely certain whether the words "for the term of his natural life with remainder to the heirs of the body of my said eldest male relative" were intended to apply at all to the "nearest male heir" or only to the "eldest of my male kindred." Possibly this may not be material, but one thing to my mind is certain, namely, that the direction to the trustees to "convey assign and assure unto the eldest of my male kindred" does not operate or arise except in the event of there being two or more heirs, or male heirs, whichever it may be, in equal degree of consanguinity to the testator, which is not the case here.

Then passing over the disposition of the personal estate, in which there is nothing material, we come to what I may call the expression of a pious wish that the tenant for life may not mortgage or anticipate, and so on, and an expression of the testator's expectation that he may keep the property devised to him in fair and tenantable repair, and keep up the remainder in trust for "my nearest and eldest male relative who shall be such at the time of the decease of the tenant for life." The person referred to in this clause as "my nearest and eldest male relative" must, in my opinion, be of the male relatives the nearest and also the eldest. That is what the clause says whatever the testator may have really meant. It may be perfectly easy to ascertain who was the nearest male relative, but not so easy to ascertain who was the eldest male relative. It is possible, but not probable, that the two would be one and the same person. It might be so; but however this may be, in my opinion the mention of the eldest male relative in this later ill-drawn clause does not, and cannot, override and revoke the previous plain devise to the "nearest male heir," so as to substitute therefor a devise to the "nearest and eldest male relative," whatever may be the true interpretation of that expression.

This testator in devising to his nearest male heir cannot, I

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think, in the circumstances have intended or contemplated any heir of his own body. If the nearest male heir of the testator's own body had been intended or contemplated, the son of a younger son might and would have taken before the daughter of an elder. Such an heir, to have taken under the devise in question, if heirs of the body were referred to, must have claimed through males and need not have been the very heir. If the testator did so intend, that is, if he meant heirs male of his own body, then, as I understand, he had no heirs of his body, and the devise could not take effect in favour of the heir of the testator's own body, because he had none. If, however, in this devise the testator did not intend or refer to heirs male of his own body, he must be taken to have referred to and meant his heir general, in which case it is well settled that a gift by a testator to his own heir male or next heir male is a gift to his heir being a male. The person to take would have to be the very heir, and if such heir were not a male the gift would fail.

A gift in remainder will, as a rule, be a vested interest in the person answering the description at the testator's death or as soon as there be one, but there might be a context requiring a different construction. Is there anything here to make the gift to "my next male heir" a gift to my next male heir not at my own death, but at the date of the death of the tenant for life? I inquired whether for this purpose there was anything in the fact that the devise being in the form of a direction to convey, which would rather imply or might be said to imply that the devisee to whom the conveyance was directed to be made must at the time of the actual conveyance be a living person—that it was to be a conveyance to the next male heir, if there were such an heir living at the time of the conveyance. I did not get any very satisfactory answer to this from anybody. What Mr. Hughes said was that that effect was produced by the occurrence of the word "such" in the clause I have spoken of as a pious declaration of a wish. I doubt the possibility of anything of that kind, but to my mind it is really immaterial, and for this reason. The defendant Mrs. Mary J. G. Watkins was the very heir at the death of the testator; she so remained at the death of the tenant for life, and she is such now. In other words, neither at the

death of the testator nor at the death of the tenant for life, if the testator had lived until then, was the heir of the testator a male.

The result consequently, in my opinion, is that the devise to the testator's next male heir fails, and the defendant Mrs. Watkins is entitled as heir general. Therefore I propose to declare that according to the true construction of this will, and in the events that have happened, the property in question on the decease of the tenant for life was undisposed of and devolved upon the defendant Mrs. Watkins as the testator's heir.

I may say that I have been brought to the conclusion which I have arrived at by a consideration of Mr. Hargrave's Note to Coke upon Littleton, 24b; the first part of chapter xv. of Mr. Vaughan Hawkins' book on the Construction of Wills; Mr. Theobald's book on the Law of Wills, 7th ed. pp. 330, 340, and 421–2; and generally the 2nd edition by Mr. Randall of Leake on the Law of Property in Land, in particular pp. 124–5, 132–3, 136–7, 246 and 248–9.

I also wish to add that my order binds no one who is not represented before me—for instance, it binds no heir claiming through males.

Solicitors: *Sharpe, Pritchard & Co., for Jeffreys & Powell, Brecon, and J. B. G. Price, Neath; Davenport, Cunliffe & Blake, for Davenport & Rose, Oxford.*

R. M

SWINFEN EADY J.

1912

June 11.

In re PALACE HOTEL, LIMITED.

[00124 of 1912.]

Company—Scheme of Arrangement—Reduction of Capital—Reorganization of Share Capital—Alteration of Preferential Rights defined by Memorandum—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 45, 46, 120.

Sect. 45 of the Companies (Consolidation) Act, 1908, is confined to two modes of reorganizing share capital, namely, (*a*) by the consolidation of shares of different classes and (*b*) by the division of shares into shares of different classes.

Whether compliance with s. 120 alone would be sufficient in the case of a scheme of arrangement involving a reorganization within s. 45, quære.

PETITION.

The above company was incorporated on February 19, 1896, with a capital of 200,000*l.* divided into 10,000 5½ per cent. cumulative preference shares of 10*l.* each and 10,000 ordinary shares of 10*l.* each, all of which were issued and fully paid.

The memorandum provided as follows :—

Clause 5. "The capital of the company is 200,000*l.*, divided into 10,000 ordinary shares of 10*l.* each, and 10,000 preference shares of 10*l.* each, and such preference shares shall confer the right to a fixed cumulative preferential dividend, at the rate of 5½ per cent. per annum on the capital paid up thereon, and shall rank both as regards dividends and capital in priority to the said ordinary shares of 10*l.* each, with power to increase, and with power from time to time to issue any shares of the new capital, with any preference or priority in the payment of dividends or the distribution of assets, or otherwise over any other shares whether ordinary or preference, and to vary the regulations of the company as far as necessary to give effect to any such preference or priority, and upon the subdivision of a share to apportion the right to participate in profits in any manner as between the shares resulting from such subdivision."

The articles provided as follows :—

Article 47. "The company may from time to time, in general meeting, reduce its capital, or subdivide its shares, or may consolidate and divide its capital, or any part thereof, into larger

amounts than its existing shares, or may convert any fully paid-up shares into stock."

Article 63. "Every registered member shall have one vote for every share held by him, but on a show of hands every member shall have one vote only . . . . "

Article 119. "The holders of the preference shares shall be entitled to receive a fixed cumulative preferential dividend of 5½*l.* per cent. per annum on the amount paid up or credited as paid up on the preference shares held by them respectively."

Article 120. "The surplus profits in each year shall be applicable to the payment of dividends to the holders of the ordinary shares in proportion to the amount paid up or credited as paid up thereon respectively."

Article 151. "In case the company shall be dissolved or wound up, the surplus assets shall be applied in repaying the paid-up capital, the preference shareholders being first paid pari passu, then the ordinary shareholders pari passu, and after the amounts credited on all the shares in the capital of the company shall have been repaid, the balance of surplus assets, if any, shall be divided among all the shareholders pro rata, according to the amounts credited as paid up on their shares."

Assets to the amount of at least 100,000*l.* being lost or unrepresented by available assets, but the property and business being still of considerable value, and there being every probability that on a reasonable capitalization the business could be carried on at a profit sufficient to enable the payment of dividends, the company prepared the following scheme of arrangement.

"Scheme of Arrangement.

"That the capital of the company be reduced from 200,000*l.*, divided into 10,000 5½ per cent. cumulative preference shares of 10*l.* each and 10,000 ordinary shares of 10*l.* each, to 100,000*l.*, divided into 80,000 4½ per cent. cumulative participating preference shares of 1*l.* each, and 20,000 ordinary shares of 1*l.* each, and that such reduction be effected:—

"(*a*) By cancelling capital which has been lost or is unrepresented by available assets to the extent of 2*l.* per share upon the 10,000 preference shares of the company, numbered 1 to 10,000 inclusive, and of 8*l.* per share upon the 10,000 ordinary shares

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of the company numbered 1 to 10,000 inclusive, which have been issued and are fully paid.

"(*b*) By subdividing each 8*l.* preference share into eight preference shares of 1*l.* each and each ordinary share of 2*l.* into two ordinary shares of 1*l.* each.

"(*c*) All arrears of dividend upon the preference shares to be cancelled and, subject to any priorities that may be given upon the issue of any new shares, the profits of the company available for distribution for the year 1912 and every subsequent year shall be applied first in payment of a cumulative dividend at the rate of 4½ per cent., on the preference shares, and any balance of such profits shall (subject as aforesaid) be distributed as to one half thereof among the holders of the preference shares and as to the other half thereof among the holders of the ordinary shares in lieu of the existing rights attached to such shares respectively.

"(*d*) In the event of liquidation the surplus assets shall be applied first in paying to the holders of preference shares 100,000*l.* to be divided amongst them in accordance with the amounts for the time being paid on the preference shares held by them respectively, next in paying to the holders of the ordinary shares 100,000*l.* to be divided amongst them in accordance with the amounts for the time being paid on the ordinary shares held by them respectively, and any balance shall be divided into two moieties and one of such moieties divided amongst the holders of preference shares and the other amongst the holders of ordinary shares in accordance with the amounts for the time being paid on the preference or ordinary shares held by them respectively. In every case no account shall be taken of amounts paid in advance of calls."

By an order made on April 1, 1912, under s. 120 of the Companies (Consolidation) Act, 1908, the company was directed to convene a separate meeting of the holders of preference shares for the purpose of considering and, if thought fit, approving (with or without modification) the said scheme of arrangement. The meeting was duly convened and held on April 24, 1912. At this meeting thirty-two members holding 3167 shares were present in person and eighty-four members holding 3420 shares were present by proxy. On a show of hands, nineteen members

voted in favour of a resolution approving the scheme and three against it, ten members not voting. On a poll 103 members holding or representing 5100 shares voted for the resolution and three members holding or representing 175 shares against it, ten members not voting.

On April 24, 1912, and May 10, 1912, general meetings were held at which a resolution embodying the scheme was duly passed and confirmed as a special resolution under s. 46 (reduction) and s. 120 (scheme of arrangement).

The reduction of capital mentioned in the scheme did not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.

The company now presented this petition for the sanction of the scheme and confirmation of the reduction.

Jenkins, K.C., and *Tindal-Robertson*, for the company. The loss is strictly proved, and we are throwing four fifths of it on the ordinary shares and one fifth on the preference shares. The preference shares retain priority as to their original 100,000*l.* capital, but their preferential dividend is altered and they give up arrears amounting to 13,750*l.* They have approved the scheme at a separate meeting under s. 120.

[SWINFEN EADY J. It was not approved by a majority holding three fourths of the preference shares.]

No. We did not consider s. 45 applicable. We are not consolidating shares of different classes into one class or dividing shares of one class into different classes. We are dividing the shares of each class separately. The surrender of arrears of preferential dividend was sanctioned in *In re Woodward, Grosvenor & Co., Ld.* (1) See Palmer's Company Precedents, 10th ed. pt. i. p. 1211; pt. ii. p. 945, the order being made under s. 120 and not under s. 45. (2) If the case were within s. 45 we should still contend that compliance with s. 120 was sufficient.

[SWINFEN EADY J. In Stiebel's Company Law, p. 724, it is stated that "This section"—s. 120—"originally only applied

(1) Neville J., April 21, 1909. Unreported.

(2) See also Palmer's Company Precedents, 11th ed. pt. i. pp. 1514, 1519.

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where a company was in winding-up, but the Act of 1907 extended it to other cases. It is not thought that the Court can under this section sanction any act of a company, which, apart from such provisions, would be ultra vires. Thus, if a scheme involves a reduction of capital, or, it would seem, an alteration to the memorandum, or a reorganization of capital under s. 45 of the Act, the company would, to get the sanction of the Court, have to go through the preliminaries under s. 120, and also under the other relevant section or sections of the Act." Prima facie that seems to be right. Then in note (*d*) the author says "There have been one or two unreported cases, where there was a reorganization of capital, and compliance with s. 120 was held to be sufficient, but the view above set out was held to be right in *Panama Hat Co., Ld.*, 00413 of 1911 (1); *Mellins Food, Ld.*, 0018 of 1912." (2)]

Those cases were probably not very fully argued on this point. In *Mellins Food, Ld.* (2) the main argument certainly was that there was no consolidation within s. 45 at all. The judge held that there was a consolidation within s. 45, and, as there was no difficulty whatever in complying with the section, the petition was adjourned for that purpose at the company's request. The point as to the sufficiency of s. 120 may have been mentioned, but there was certainly no final decision on that point. There was probably a similar adjournment without any real argument in *Panama Hat Co., Ld.* (1), and if the point really arose we should certainly contend that compliance with s. 120 would be sufficient in the case of a scheme involving a reorganization within s. 45.

Finally, quite apart from this question, the scheme is just and equitable, and as it is merely incidental to a reduction of capital the Court has ample jurisdiction to confirm it: *Balmenach-Glenlivet Distillery, Ld.* v. *Croall* (3); *British and American Trustee and Finance Corporation* v. *Couper* (4); *Poole* v. *National Bank of China, Ld.* (5)

(1) Neville J., Feb. 27, 1912. Unreported.
(2) Neville J., March 5, 1912. Unreported.
(3) (1906) 8 F. 1135.
(4) [1894] A. C. 399.
(5) [1907] A. C. 229.

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SWINFEN EADY J. This is a petition for the sanction of a scheme of arrangement and confirmation of a reduction of capital on the ground that 100,000*l.* has been lost or is unrepresented by available assets. The original capital was 200,000*l.* divided into 10*l.* shares, half of which were preference and half ordinary. The memorandum gave the preference shares a cumulative preferential dividend of 5½ per cent. and a priority as to capital. It is proposed to reduce the capital by 100,000*l.* by writing off 2*l.* on each preference share and 8*l.* on each ordinary share, the priority of the preference capital being preserved to the full original amount of 100,000*l.* Each reduced preference share is then subdivided into eight preference shares of 1*l.* each and each reduced ordinary share into two ordinary shares of 1*l.* each. The loss has been clearly proved and down to that point there is no difficulty.

It is then proposed to alter the dividend rights of the preference shares as defined by the memorandum. At present they carry a cumulative preferential dividend of 5½ per cent. and have no further interest in profits. It is proposed to cancel the arrears of dividend and to reduce the future cumulative dividend to 4½ per cent. and to give the preference shareholders one moiety of the remaining profits of each year, so that they will have 4½ per cent. cumulative preferential dividend and one half of the balance of the remaining profits. Proper meetings have been held under ss. 46 and 120 and the scheme has been approved by special resolutions. The only question is whether the case comes within s. 45, the provisions of which have admittedly not been complied with.

Sect. 45 provides that a company limited by shares may by special resolution confirmed by an order of the Court modify the conditions contained in its memorandum "so as to reorganise its share capital" whether by "the consolidation of shares of different classes" or by "the division of its shares into shares of different classes." There is then a proviso that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class "holding three fourths of the share capital of that class" and confirmed at a

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meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class.

This section is a re-enactment of s. 39 of the Companies Act, 1907 (7 Edw. 7, c. 50). It applies to two modes of reorganizing share capital, namely, (*a*) the consolidation of shares of different classes into shares of one class and (*b*) the division of shares of one class into shares of different classes. Such a reorganization is not within the ambit of this petition. There is no consolidation or division within (*a*) or (*b*). Shares are not divided into different classes; the previous division into preference and ordinary shares remains, but each share in the respective classes is divided into shares of smaller denomination, and the division is merely part of the scheme of reduction, whereby each class of shares is separately reduced. A division of this nature is not within s. 45, and it was therefore not necessary to comply with its provisions which require the resolution to be passed by a majority of the shareholders of that class "holding three fourths of the share capital of that class" and not merely by a three-fourths majority of those present in person or by proxy at the meeting.

Sect. 120 having been complied with, and s. 45 being inapplicable, it is not necessary to consider the question whether compliance with s. 120 alone would be sufficient in the case of a scheme involving a reorganization within s. 45. I sanction the scheme and confirm the reduction.

Solicitors: *Ashurst, Morris, Crisp & Co.*

G. R. A.

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June 26.

In re DUPPA.

FOWLER *v.* DUPPA.

[1912 D. 742.]

Revenue—Legacy Duty—Successive Interests—Bequest for Lives—Remainder to Contingent Class—Same Rate of Duty—Possible Intestacy—Next of Kin liable to Smaller Rate — Mode of Payment — Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *ss.* 6, 12, 15, 17.

A testator bequeathed his residue to life tenants with remainder to a contingent class, so that there was a possible intestacy in the event of the contingent class failing.

The contingent class on becoming entitled would be chargeable with legacy duty at the same rate as the life tenants, but the statutory next of kin would be chargeable at a smaller rate:—

Held, (*a*) that, notwithstanding s. 17 of the Legacy Duty Act, 1796, the contingent bequest could not for the purpose of duty be treated as absolute, as that section was confined to cases where the legacy or residue was susceptible of retainer, delivery, payment, satisfaction, or discharge within s. 6.

(*b*) That under s. 15 the next of kin entitled under the possible intestacy must be treated as entitled in succession under the will.

(*c*) That the residue was therefore "given" to different persons in succession chargeable with different rates of duty within s. 12, and consequently the duty was not now payable out of capital, but the life interests were chargeable by way of annuity.

ORIGINATING SUMMONS.

By his will dated October 9, 1905, a testator devised and bequeathed his residuary real and personal estate to his executors and trustees upon trust for sale and conversion and directed them to hold the proceeds (after paying his funeral and testamentary expenses and debts and paying or providing for his legacies) upon trust to pay the income to Gregaria, Carlos, and Alfredo during their joint lives in equal shares, and after the death of one of them to the survivors during their joint lives in equal shares and after the death of one of those survivors to the survivor for life, and subject thereto in the events that happened the capital and income were to be held in trust in equal shares for the children of Gregaria, Carlos, and Alfredo living at the death of the survivor of those three persons who should attain the age of twenty-one years or being female marry under that

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age and for all or any the issue living at the time aforesaid who should attain the age of twenty-one years or being female marry under that age of any child of Gregaria, Carlos, and Alfredo who should die before the time aforesaid leaving issue living at the time aforesaid, such issue to take through all degrees according to their stocks in equal shares the share or shares which their parent would have taken if living at the time aforesaid and having then attained a vested interest, and so that no issue should take whose parent was living at the time aforesaid and so capable of taking. The will contained no gift over in the event of failure of the contingent class.

The testator died on July 27, 1910. His statutory next of kin were his widow, his sister, and five infant nephews and nieces, children of a deceased brother. The executors had paid the funeral and testamentary expenses and debts and paid or provided for the legacies. The residue amounted to 12,450*l.* and the income to 500*l.* a year.

Gregaria, Carlos, and Alfredo, aged thirty, twenty-eight, and twenty-five respectively, were still unmarried, so that the contingent class was not yet in existence. They were chargeable with legacy duty at 10 per cent. on their life interests, and the contingent class on coming into existence and attaining a vested interest would be chargeable at the same rate. On the other hand, if the contingent class failed the widow would pay 1 per cent. on her moiety and the sister and infants 5 per cent. on their respective fourths.

The Inland Revenue were prepared to accept duty on the life interests for the present. This would amount to 1130*l.* payable in four yearly instalments, which would, however, cease if the life interests were previously determined. Duty on the capital would ultimately be payable at 10 per cent. if the contingent class took, or at the lower rates if the next of kin took.

In the alternative the Inland Revenue were prepared to accept the full 10 per cent. duty on the capital without liability to refund if the lower rates became payable. This duty with a small sum for interest only amounted to 1270*l.*, and the life tenants with the concurrence of the widow and sister wished the amount to be at once paid out of capital.

The executors issued this summons to determine whether they ought to make that payment.

Stafford Crossman, for the executors.

Farwell, for the life tenants and the testator's widow and sister. The duty on the life interests being 1130*l.* and the whole duty on the residue if paid now being only 1270*l.*, there is an obvious advantage to the estate in paying the entire duty at once. The widow and sister, who will take three fourths of the residue if the contingent class fails, concur with the life tenants in wishing this to be done, but it is opposed on behalf of the infant nephews and nieces, and the question must therefore be decided on the strict legal position.

Sect. 12 of the Legacy Duty Act, 1796, provides (*a*) that the duty payable on a legacy or residue of any personal estate "given" to or for the benefit of different persons in succession chargeable with the same rate of duty shall be paid out of the legacy or residue "so given" as in the case of a legacy to one person; and (*b*) that where any legacy or residue shall be "given" to or for the benefit of different persons in succession chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who under such bequest shall be entitled for life only shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity.

Looking at the gift in the will the case is clearly within provision (*a*). The residue is given to the life tenants with remainder to the contingent class and the duty is the same throughout. It is true that if the contingent class failed there would be an intestacy and the statutory next of kin entitled in that event would pay a different rate. But the property is not given to them by the will at all, and their rights under a possible intestacy do not remove the case from provision (*a*) to provision (*b*).

It will no doubt be contended that s. 15 is applicable. It provides that where any legacy or residue shall be so given by any will that different persons shall become entitled thereto in succession, the duty shall be charged thereon as given to be

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enjoyed in succession, whether the persons entitled thereto shall take the same under such will and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy. But that section only applies to an intestacy necessarily arising under a disposition incomplete on the face of the will, e.g., a gift of a life interest without any gift in remainder. It does not apply to a mere possible intestacy arising from the failure of a contingent class.

For the purpose of determining whether this case falls within provision (*a*) or provision (*b*) the bequest to the contingent class must be treated as an absolute bequest. Sect. 17 provides that when any legacy or residue shall be "given" subject to any contingency which may defeat such gift, such bequest (unless chargeable as an annuity under the provision herein contained) —i.e., provision (*b*)—shall be charged with duty as an absolute bequest, to the persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy or residue notwithstanding the same may upon such contingency go to some person not chargeable with the same duty; and if such contingency shall afterwards happen and the property shall thereupon go in such manner that the same if taken immediately after the death of the testator under the same title would have been chargeable with a higher rate of duty than the duty so paid, the persons becoming entitled thereto shall be charged with and shall pay the difference between the duty so paid and such higher rate of duty. There is no provision for any return of duty if the higher rate has been first paid.

[SWINFEN EADY J. Is not s. 17 confined to cases where the legacy or residue is susceptible of retainer, delivery, payment, satisfaction, or discharge within s. 6? Why is this bequest not chargeable as an annuity?]

This residue is now retained for the benefit of the life tenants and the contingent class. As it therefore falls within provision (*a*) and not provision (*b*) it is not chargeable as an annuity.

Cann, for the infant nephews and nieces. Sect. 17 is clearly limited to a vested gift subject to be divested. Sect. 15 is not limited to cases of intestacy necessarily resulting from the

dispositions of the will, but applies to cases of possible intestacy. For the purpose of legacy duty the residue must in the events that have happened be treated as given by the will to the life tenants with remainder to the statutory next of kin subject to a divesting clause in favour of the contingent class. This clearly falls within provision (*b*), and the life interests are chargeable as an annuity.

The supposed benefit to the estate of paying the duty out of capital is rather problematical. Under s. 8 and s. 12 the 1130*l.* on the life interests is payable out of income by four yearly instalments of 282*l.* 10*s.* and these instalments are only payable while the life interests continue. If the life tenants die after the first instalment is paid the balance will not be payable. If the contingent class failed the widow would pay about 60*l.*, the sister about 150*l.*, and the infants about 150*l.* On the other hand, if the whole duty 1270*l.* is now paid out of capital they would have paid about 635*l.*, 317*l.*, and 317*l.* respectively.

SWINFEN EADY J. The question is whether the executors ought now to pay 10 per cent. legacy duty on the capital value of the residuary estate out of capital. The residue is given in trust for three persons jointly during their lives and the lives of the survivors and survivor. On the death of the last survivor there is a gift to a contingent class of their children and issue. This gift is contingent on their surviving the last life tenant and attaining twenty-one or if female marrying, and they have yet to come into existence. If they should come into existence and acquire a vested interest they would be liable to legacy duty at the rate of 10 per cent. There is no ultimate gift over in default of their acquiring a vested interest, and if the contingent class failed there would be an intestacy. The statutory next of kin entitled in that event would pay different rates of duty. The widow would pay 1 per cent. on her moiety. The sister and the infant nephews and nieces would pay 5 per cent. on their respective fourths. The question is whether in these circumstances the executors are now entitled to pay the 10 per cent. duty out of capital.

Sect. 12 of the Legacy Duty Act, 1796, provides (*a*) that

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"The duty payable on a legacy or residue, or part of residue, of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of residue, so given, as in the case of a legacy to one person." That is not this case. The section proceeds (*b*) "and where any legacy or residue, or part of residue, shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon,"—that is this case, as it is impossible now to determine the ultimate rate of duty—"all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce." It is then provided that the persons becoming absolutely entitled to such legacy or residue so to be enjoyed in succession shall be chargeable with and pay the duty for the same when and as they receive the same in the same manner as if it had come to them immediately on the death of the person by whom it was given. It is clear, therefore, that the life tenants must pay the duty on their life interests by equal portions during four years if they live so long. If they die previously the instalments will cease. The ultimate duty will be payable at the proper rate by the persons who become absolutely entitled.

Sect. 15 provides that where any legacy or residue shall be so given by any will that different persons shall become entitled thereto in succession, the duty shall be charged thereon as given to be enjoyed in succession, whether the persons entitled take

under the will or under a partial intestacy. The next of kin must therefore be treated for the purpose of duty as if entitled in succession under the will.

Sect. 17 provides that "When any legacy, or any residue or part of residue, shall be given, subject to any contingency which may defeat such gift, and whereupon the same may go to some other persons or person, such bequest (unless chargeable as an annuity under the provisions herein contained) shall be charged with duty as an absolute bequest, to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy, or residue or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix, under the same title would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto, shall be charged with and shall pay the difference between the duty so paid, and such higher rate of duty."

That section refers to cases where the legacy or residue is susceptible of retainer, delivery, payment, satisfaction, or discharge within s. 6. It does not apply where the bequest is chargeable as an annuity under s. 12. The result is that the executors ought not now to pay the duty out of capital.

I am told that the Inland Revenue are willing to accept duty at 10 per cent. on the life interests, or on the capital, but that if the 10 per cent. is paid on the capital there will be no return of duty in the event of a lower rate being ultimately payable. In these circumstances it is clear that the executors ought not now to make the payment out of capital, but ought to allow the duty on the life interests to fall on the life tenants in four yearly instalments.

Solicitors: *Fowler & Co.; Meynell & Pemberton.*

G. R. A.

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June 19, 20, 21; *July* 5.

[1911 H. 1765.]

Local Government—Urban Authority — Highway Authority — Agreement to widen Highway—Contract not under Seal but executed—Contract over 50l. in Value—Statute of Frauds—Part Performance—Estoppel—Highway Act, 1864 (27 & 28 *Vict. c.* 101), *ss.* 47, 48, 53—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 154, 173, 174.

Sect. 174 of the Public Health Act, 1875, is not limited to contracts made for work to be done for or goods to be supplied to an urban authority, but applies to every contract made by an urban authority under any of the powers created by that Act.

The plaintiff deposited plans with the defendants for erecting thirty-six houses on his land, which was in the defendants' district and on one side adjoined a narrow highway, and at the instance of the defendants altered his plans and signed an agreement, purporting to be made between himself and the defendants, whereby he agreed to remove his boundary fence and to throw a strip of land into the highway the whole length of his frontage so as to widen the highway to a uniform width of forty feet, and the defendants, in consideration of his so doing, agreed at their expense to make up and adopt the strip of land as a highway. Matters proceeded on the footing that the agreement was binding on both parties. The plaintiff built his houses and fulfilled his part of the agreement and gave possession of the strip of land to the defendants, who took possession of it, but did not make it up or adopt it as a highway. To an action by the plaintiff to compel the defendants specifically to perform their part of the agreement the defendants pleaded that the agreement could not be enforced against them because, as the fact was, it was not sealed by them nor signed by any one on their behalf, and they relied on the provisions of the Public Health Act, 1875, and also on the Statute of Frauds:—

Held, that the agreement was a contract to widen a highway made by the defendants, not as a highway authority, but as an urban authority under the powers vested in them by s. 154 of the Public Health Act, 1875.

Held, also, that the contract, being over 50*l.* in value, required to be sealed by the defendants pursuant to s. 174 of the Act.

Held, also, that, as the contract had been partly performed, the Statute of Frauds afforded no defence to the action.

But *held*, also, that the defendants were not in any way estopped from relying on the fact that the contract was not under seal and therefore was not binding upon them.

The action was accordingly dismissed, but without costs.

WITNESS ACTION.

This was an action to enforce specific performance of an agreement to widen a highway in these circumstances.

The plaintiff was the owner in fee of a building estate situate at the junction of Edgware Road and Stag Lane in the parish of Kingsbury, in the county of Middlesex. The parish formed the district of the defendants, who were the local sanitary authority. Stag Lane was a public road about twenty feet in width. The plaintiff's estate on its south-eastern side abutted on Stag Lane for a distance of about 1000 feet in length, but was on a lower level, and the boundary hedge separating it from Stag Lane was on the plaintiff's land.

Early in May, 1909, the plaintiff deposited plans with the defendants for the erection of some 200 houses on his estate. The plans shewed that thirty-six houses were to be erected fronting Stag Lane and were to be set back fifteen feet from the boundary hedge. On May 22, 1909, an interview took place between the plaintiff and Mr. Diaz, the chairman of the defendants, when Mr. Diaz suggested that if the plaintiff would set back his building line to Stag Lane another twenty feet and would remove the hedge and make up and level a strip of his land twenty feet in width and throw it into Stag Lane the whole length of his frontage, so as to give that road a uniform width of forty feet, the defendants would adopt the strip as a public road and would at their own cost make it up as a public road with a footpath adjoining the plaintiff's land. After some discussion the plaintiff agreed to this proposal.

Mr. Diaz accordingly prepared the following document:—

"Memorandum of agreement made the 26th day of May, 1909, between Walter Edward Hoare Esquire of the one part and the Kingsbury Urban District Council of the other part whereby the said Walter Edward Hoare hereby agrees and binds himself to remove the hedge on his land abutting all along the old highway known as Stag Lane as the building of houses on his land abutting thereon proceeds and to excavate remove and level up the whole strip of his land and to give up the same to the parish or district council as an addition to and so as to make the said highway known as Stag Lane forty feet wide as shown by the plan approved by the council, the excavating and levelling of such strip of land to bring the same to the same height and surface as the existing highway above mentioned

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such work to be carried out at Mr. Hoare's expense. And in consideration of the giving up of such land the council agree with the said Walter Edward Hoare to make up the same as a parish or public road and with a footway adjoining his land at the cost of the council as the building of the houses proceeds and to adopt the same as a parish or public highway."

This agreement and the plaintiff's plans amended so as to shew the widening of Stag Lane, including a plan for the erection of the first eight of the thirty-six houses, were submitted for approval by Mr. Diaz at a meeting of the defendants held on May 26, 1909, and the minute of the proceedings was as follows:—

"*Stag Lane Estate.* The council in committee considered the plans submitted by Mr. F. J. Wheeler builder acting for W. E. Hoare Esq. in reference to the Stag Lane Building Estate, and gave much consideration to the question of combined drainage and the proposed widening of the old highway Stag Lane to forty feet and the clerk read an agreement drawn up by the chairman respecting the above mentioned widening of Stag Lane.

"Councillor Shefford moved and Councillor Walker seconded:

"That the plans submitted by W. E. Hoare Esqre. and his builder Mr. F. J. Wheeler in respect of houses to be built by the said Mr. Wheeler for the said Mr. Hoare be and are hereby approved by this council subject to the said Mr. Hoare signing and returning to this council forthwith the said plans and memorandum of agreement between this council and the said Mr. Hoare regarding the making up of the old highway Stag Lane and the strip of land given up to this council by the said Mr. Hoare also subject to Mr. Hoare entering into an agreement with this council when called upon in the form submitted to him by this council in respect of the combined drainage allowed to him by this council on the eight houses marked on the plan A to B and on any other houses specified on the said plans which the council may hereafter allow.

"Carried unanimously."

A copy of this resolution with the plans and memorandum of agreement were sent to the plaintiff by the clerk of the defendants, and the memorandum of agreement and plans were in due course

signed and returned by the plaintiff. Mr. Diaz, as chairman of the defendants, also signed the plans.

A plan of the proposed widening of Stag Lane, shewing the strip of land to be given by the plaintiff, was also prepared by the surveyor of the defendants, and this plan and the agreement signed by the plaintiff were submitted by Mr. Diaz at a meeting of the defendants held on June 23, 1909, when the following resolution was passed:—

"That the committee recommend that the said plan submitted by the surveyor in respect to the widening of the said portion of the highway aforesaid be and is hereby approved by this council. Such plan to be signed by Mr. Wheeler, Mr. W. E. Hoare's builder and representative, and the chairman of this council."

A copy of this resolution was sent to the plaintiff, and the plan was in due course signed by Mr. Wheeler and Mr. Diaz.

As the building operations proceeded, plans of each block of the thirty-six houses fronting Stag Lane were from time to time submitted by Mr. Wheeler on behalf of the plaintiff to the defendants, and were duly approved, as appears by the following minutes of the defendants:—

Minute—September 22, 1909.

"That the application dated the 17th inst. presented to this council by Mr. F. J. Wheeler on behalf of Mr. W. E. Hoare in reference to fourteen additional houses in Stag Lane numbered 9—22 inclusive in conformity with the plan submitted and approved by this council on the 26th of May 1909 be and is hereby granted subject to the conditions contained in the resolution of this council dated the 26th of May 1909 in respect of the said estate and that the said plan regarding the fourteen additional houses aforesaid be signed by the chairman of this council and Mr. Hoare and his builder."

Minute—October 26, 1910.

"That the committee recommend that the application and plan dated the 15th inst. submitted by Mr. F. J. Wheeler on behalf of Mr. W. E. Hoare for the erection of fourteen houses in Stag Lane Nos. 23 to 36 inclusive be and are hereby approved by this council subject to the terms and resolution of this

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council dated the 26th of May 1909 and also subject to the work being carried out to meet the requirements of this council's bye-laws and to the satisfaction of our surveyor, and that such plan be signed by the chairman of this council and Mr. Wheeler and Mr. Hoare."

On each of these occasions a copy of the resolution was sent to the plaintiff and the plan was signed by all the parties named.

About February 5, 1910, an interview took place between the plaintiff and Mr. Diaz, with the result that the defendants greensswarded the strip of land and, in reply to a letter from the plaintiff, instructed their clerk to inform him "that this council, being the highway authority of Stag Lane and the greensward adjoining thereto given up by Mr. Hoare to this council, take upon themselves as a matter of course all the responsibilities and liabilities in respect of the greensward aforesaid."

In the meantime the defendants had on July 28, 1909, applied to the Local Government Board to sanction a loan of 1218*l.* to widen and improve Stag Lane in accordance with the plan of their surveyor passed by them on June 23, 1909, and on February 15, 1910, the Board formally sanctioned the loan. In November, 1910, the defendants, in answer to their advertisements, received tenders for the loan, which they by a resolution of November 23, 1910, left entirely in the discretion of their chairman, with full authority to select any tender and to affix the seal of the defendants to any mortgage for that purpose. Mr. Diaz, however, did not accept any tender nor raise any money to make up Stag Lane, and the plaintiff in June, 1911, brought this action, and by his statement of claim alleged, as the fact was, that he had fulfilled the whole of his part of the agreement of May 26, 1909, and he claimed specific performance of the agreement; alternatively, he asked for recovery of possession of the strip of land.

By their defence the defendants alleged, as the fact was, that the agreement had never been signed by any one on their behalf, nor had their seal been affixed thereto, and they submitted that it was not binding on them and could not be specifically enforced against them, and they relied on the provisions of the Public

Health Act, 1875, and the Statute of Frauds. Alternatively, they pleaded that, if there was any obligation upon them to make up Stag Lane, it was arranged at the interview of February 5, 1910, that any question of making up Stag Lane as a highway should be postponed until the plaintiff had completed all his thirty-six houses, and that he had not yet completed them. They also offered to the plaintiff that he should resume possession of the strip of land. The plaintiff, in reply, relied on acts of part performance as an answer to the Statute of Frauds, and alleged that the defendants were estopped from setting up that they were not bound by the agreement.

It appeared from the evidence that the delivery of the defence was the first intimation to the plaintiff that the agreement of May 26, 1909, was not sealed or signed on behalf of the defendants; that at the commencement of the action twenty-eight of the thirty-six houses were completely finished and most of them were let, and that the remaining eight houses were erected and roofed in, but not quite complete internally; and that a dwarf brick wall surmounted with an iron railing had been built along the whole distance in front of the thirty-six houses. There was a conflict of evidence as to what occurred at the interview of February 5, 1910; the plaintiff denied that he agreed to postpone the making up of Stag Lane until all his thirty-six houses were completed, and alleged that he consented only to a temporary postponement and to the greenswarding of the strip of land in the meantime as a temporary measure. It also appeared that the defendants had greenswarded the strip of land and had planted trees on it. They had also erected three lamp-posts on it which were connected by pipes with the gas main on the further side of Stag Lane. A water main and electric cables for supplying the houses had also been laid along the strip of land.

Macmorran, K.C., Peterson, K.C., and *Maugham*, for the plaintiff. The widening of Stag Lane was no part of the plaintiff's original scheme. It was proposed by the chairman of the defendants. The memorandum of agreement, the signed plans, and the resolutions of May 26 and June 23, 1909, are

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ample evidence of the contract made between the plaintiff and the defendants. The plaintiff has wholly performed the agreement on his part, and the defendants now say that it is not binding on them because it is not under seal. That raises the question whether this agreement is a contract within ss. 173 and 174 of the Public Health Act, 1875. First, it is submitted that those sections only apply to contracts made under powers created by the Act and are limited to contracts for work to be done for or goods to be supplied to the local authority, and do not apply to a contract made by a local authority for other purposes. The defendants will rely on *Hunt* v. *Wimbledon Local Board* (1) and *Young & Co.* v. *Royal Leamington Spa Corporation* (2), but both of those cases come within the principle just stated, and no case has decided that a contract to widen a road is within the sections. *Williams* v. *Barmouth Urban Council* (3), *Attorney-General* v. *Gaskill* (4), and *Hodge* v. *Matlock Bath, &c., Urban Council* (5) establish that those sections only apply to contracts made under the Act. Secondly, this agreement is not a contract made under the powers created by the Act, nor is it necessary for carrying the Act into execution. It is a contract made by the defendants as the highway authority under s. 144 of the Act. That section gives them no new powers. It only transfers to them as the highway authority all the powers of a surveyor of highways. Therefore everything that a surveyor of highways can do they can do, and this is an agreement which a surveyor of highways could enter into with a landowner: *Burgess* v. *Northwich Local Board.* (6) The Highway Act, 1835, does not confer on a surveyor of highways power to widen a road, but by s. 82 there is compulsory power to widen a highway under an order of justices. The Highway Act, 1864, ss. 47, 48, and 53, expressly empowers a highway board to widen highways. Here, the highway in question was prior to 1880 under the jurisdiction of the old Edgware Highway Board. In March, 1880, under an order made at the Middlesex quarter sessions, the powers of the board were transferred to the Hendon Rural Sanitary

(1) (1878) 4 C. P. D. 48.
(2) (1883) 8 App. Cas. 517.
(3) (1897) 77 L. T. 383, 387.
(4) (1882) 22 Ch. D. 537, 542.
(5) (1910) 75 J. P. 65.
(6) (1880) 6 Q. B. D. 264, 276.

Authority. Then by an order of November 7, 1894, of the Local Government Board, confirming an order of the Middlesex County Council, the Urban District Council of Wembley was carved out of the Hendon Rural Sanitary Authority, and by the same order the Wembley Urban District Council was divided into two wards, namely, the parish of Wembley and the parish of Kingsbury; and by another order of the Local Government Board, dated March 27, 1900, confirming another order of the Middlesex County Council, the parish of Kingsbury was constituted a separate urban district under the name of the Kingsbury Urban District Council. It is submitted, therefore, that the defendants are the successors of the old Edgware Highway Board so far as the parish of Kingsbury is concerned and can exercise all the powers of that board as a highway authority, and when they proceed to widen a highway they are acting as a highway authority and not under any new power created by the Act of 1875. Under s. 154 of that Act they have only power to purchase land for the purpose of widening a highway, and that section does not apply here: *Graham* v. *Newcastle-upon-Tyne Corporation.* (1) The result is that this agreement, being an agreement which can lawfully be made between the plaintiff and the defendants, as surveyors of highways or as a highway board, is not a contract under s. 174 of the Act and does not require a seal. Thirdly, s. 174 only applies to a contract which exceeds 50*l.* in value. This agreement on its true construction is not such a contract. The only thing binding on the plaintiff is to throw his strip of land into the road, and all the defendants are bound to do is to make up the road "as the building of the houses proceeds." There is no obligation on the plaintiff to build thirty-six houses. The contract comes into operation as each house is erected, and on the evidence the cost of making up the road as each house is built will only amount to a few pounds. It will require several houses to make up the 50*l.* There is therefore nothing in the agreement which would or must exceed 50*l.* If so, then s. 174 does not apply: *Eaton* v. *Basker.* (2) Fourthly, under the circumstances, the defendants are estopped from setting up that the contract is not under seal. By their conduct they have represented

(1) [1893] 1 Q. B. 643. (2) (1881) 7 Q. B. D. 529, 531.

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to the plaintiff that the agreement was sealed and was binding on both of them, and he has acted on the faith of that representation. There is nothing to prevent them from affixing their seal to it to-day. Moreover, they can waive the objection as to the want of the seal—*Bournemouth Commissioners* v. *Watts* (1); *Graham* v. *Huddersfield Corporation* (2)—and they have waived it by informing the plaintiff from time to time that he must act in conformity with the resolution of May 26, which was binding on him. Fifthly, they say the agreement is ultra vires, but *Portsmouth Corporation* v. *Hall* (3) shews that such an agreement is not necessarily ultra vires. Sixthly, the Statute of Frauds is no defence, because there has been part performance and the contract can be enforced: *Lawford* v. *Billericay Rural Council.* (4) Moreover, in every instance the plans and the minutes were signed by Mr. Diaz, the chairman. Lastly, the plaintiff's alternative claim for recovery of possession of the strip of land cannot be enforced. He has in effect dedicated the strip of land to the public and cannot now withdraw it, although the defendants are not bound to take it over. It has become part of the highway.

Jenkins, K.C., and *Cozens-Hardy*, for the defendants. The alleged agreement is ultra vires the defendants. They had no power to enter into it either under the Highway Acts or the Act of 1875. It is an agreement to accept the dedication of a piece of land and to make it up as a highway at the cost of the defendants. A surveyor of highways would have no power under the Highway Acts to enter into such an agreement, nor have the defendants such a power under ss. 144—148 of the Act of 1875: *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board.* (5) A highway board could purchase land to widen a highway under ss. 47, 48, and 53 of the Highway Act, 1864, and the defendants have a similar, if not wider, power under s. 154 of the Act of 1875, but this agreement is not within s. 154. If, however, it does fall within the scope of that section, then it is a contract made under the powers of the Act, and *Hunt* v.

(1) (1884) 14 Q. B. D. 87, 90.
(2) (1895) 12 Times L. R. 36.
(3) (1907) 71 J. P. 564.
(4) [1903] 1 K. B. 772
(5) (1888) 60 L. T. 172.

Wimbledon Local Board (1) and *Young & Co.* v. *Royal Leamington Spa Corporation* (2) shew that the omission of the seal is fatal to the plaintiff's claim. Sect. 174 is imperative and applies to every contract made under the powers of the Act and is not limited, as suggested, to contracts for work to be done for or goods to be supplied to an urban authority, and s. 308 only applies to contracts made under the Act. The cases of *Williams* v. *Barmouth Urban Council* (3), *Attorney-General* v. *Gaskill* (4), *Hodge* v. *Matlock Bath, &c., Urban Council* (5), and *Burgess* v. *Northwich Local Board* (6) are all instances of contracts not made under the powers of the Act. *Lawford* v. *Billericay Rural Council* (7) is the exception to the rule that a contract by a corporation must be under seal and altogether falls short of this case; it followed *Clarke* v. *Cuckfield Union.* (8) Assuming that the agreement is within the powers of the defendants, the inference is that it was made under the Act of 1875 and not under some other statutory power, because the defendants sought to raise a loan under the Act of 1875, and not under the Highway Act, 1864, for the purpose of carrying it into effect. Next, the contract on its true construction is over 50*l.* in value. It does not mean that the defendants are to make up the highway as each house is built, but it means that the plaintiff is to give up the whole strip of land shewn on the plans, and in consideration of his giving up "such land," that is, the whole strip, the defendants are to follow him up as the houses are built and to make up the whole strip. The plaintiff could not say that he would build only one house and no more, and that the defendants must make up the road for that one house. Further, on the evidence the defendants are not estopped from relying on the want of the seal. Lastly, the defendants are not the successors of the Edgware Highway Board. The orders of the Local Government Board did not transfer to them any of the powers of the old board. Those orders were made under ss. 57—59 of the Local Government Act, 1888, and only altered the boundaries of the

(1) 4 C. P. D. 48.
(2) 8 App. Cas. 517, 522.
(3) 77 L. T. 383.
(4) 22 Ch. D. 537.
(5) 75 J. P. 65.
(6) 6 Q. B. D. 264.
(7) [1903] 1 K. B. 772.
(8) (1852) 21 L. J. (Q.B.) 349.

NEVILLE J. districts of the then existing authorities and constituted and divided them into separate districts for financial purposes, and apportioned their property and liabilities; and the order of 1900 constituted the parish of Kingsbury a new urban district which did not require a transfer of any highway powers, because it would have ample powers as to highways under the Act of 1875.

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Macmorran, K.C., in reply, on the question of specific performance, cited Fry on Specific Performance, 5th ed. p. 323, § 648 (iii.); *Wilson* v. *West Hartlepool Ry. Co.* (1); *Crook* v. *Seaford Corporation* (2); *Marshall* v. *Queenborough Corporation.* (3)

Jenkins, K.C., on the cases last cited, referred to Lindley on Companies, 6th ed. vol. i. p. 269; *Young & Co.* v. *Royal Leamington Spa Corporation.* (4)

Cur. adv. vult.

July 5. NEVILLE J. There are one or two questions of fact which must be disposed of before the questions of law raised in this case can be dealt with. The agreement between the parties is shewn by the memorandum of May 26, 1909, signed by Mr. Hoare and agreed to by the defendants, though neither signed nor sealed on their behalf. It is, however, alleged by the latter that that agreement was modified in its terms by a subsequent parol agreement come to between Mr. Diaz, the chairman of the council, and the plaintiff. I find that that amounted to no more than an agreement to allow the council to temporarily defer the making up of the road for an indefinite time, and not, as alleged on behalf of the defendants, until completion of the whole thirty-six houses fronting Stag Lane, and that at the date of the action the plaintiff was entitled to have the road made up by the defendants under the terms of the agreement, subject to the question hereafter dealt with as to the enforceability of the agreement. I find further that at all material times it was supposed by both parties that the agreement was a binding one, and that no representations were made to the plaintiff by the defendants that were not consonant with what they understood to be the true state of facts. In my

(1) (1865) 2 D. J. & S. 475.
(2) (1870) L. R. 10 Eq. 678.
(3) (1823) 1 S. & S. 520.
(4) 8 App. Cas. 517, 522.

opinion no conduct on the part of the defendants has been proved which could estop them from relying upon the fact that the agreement in question was not under seal. I find also that possession of the strip of land in question was given by the plaintiff to the defendants and accepted by them, and that in an action for specific performance the defendants are not entitled to rely upon the Statute of Frauds, although the contract related to land, inasmuch as there has been part performance of it. In my opinion the contract was over 50*l.* in value. This depends upon the construction of the agreement. In my opinion the contract was entered into by both parties with reference to the intention of the plaintiff to build thirty-six houses fronting Stag Lane, indicated by the plan submitted to the council and by the plan for the widening of the lane signed by or on behalf of both parties. I think upon the true construction of the agreement the plaintiff was bound to throw into Stag Lane the strip all along his land abutting on Stag Lane, in return for which the council were to make up the whole of the strip as a public road with a footway adjoining his land, and that the words "as the building of houses proceeds" merely indicate the time at which the mutual obligations were to be performed, and do not make the contract one for dealing with anything but the whole strip.

I now proceed to consider whether the contract is enforceable under the circumstances, having regard to the provisions of the Public Health Act, 1875, and the fact that the agreement was not sealed. Turning to ss. 173 and 174, it has, I think, been decided that s. 174 refers to contracts made under the Act. In my opinion the present contract was so made. It is said that the defendants have the powers of a highway board under the Highway Act, 1864, and that they were acting either under those powers or as surveyor of highways in exercise of the powers conferred upon them by s. 144 of the Public Health Act, 1875. I do not think that they were shewn to have the powers of a highway board, or that the powers of a surveyor would justify the agreement; but, however that may be, they did not, in my opinion, purport to exercise any other powers than those vested in them as an urban authority

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under the Act, and I think the agreement in question was made under the Act. It has been argued that the agreement was beyond their powers, but this I think is not so. Under s. 154 they have power to purchase land for widening any street, and, in my opinion, power to purchase gives them power to pay in money's worth as well as money. I see no reason for limiting their power by a narrow construction so as to exclude a transaction which appears to me to be of a useful character, and which I think is not infrequently resorted to.

That being so, is the agreement not enforceable because it is not under seal? It has been decided that sub-s. 1 of s. 174 is imperative, and I have been referred to no case in which a contract has been held enforceable, though unsealed, in respect of a contract over 50*l.* in value, even though the contract has been executed by the plaintiff. It has indeed been held that where an unsealed contract of a corporation for work to be done or goods to be supplied has been fully executed by the other party, he may in certain cases recover, not on the original contract, but on an implied contract to pay quantum meruit. The present action is brought for specific performance of the original contract, and I fail to see how, in the absence of a right to resort to the original contract, a contract on the part of the urban authority to make up the strip as a public highway can be implied, or that, if a landowner is minded to throw a portion of his land into an adjoining highway, a promise to do anything in return can be implied against the highway authority.

There remains a further point to consider. At the end of the reply a point was raised which seemed to me to require consideration. Had the only difficulty in the plaintiff's way been the Statute of Frauds, there had been, I think, as I have already stated, sufficient part performance of the agreement to take the case out of the statute in an action for specific performance. It was argued that the equitable doctrine of part performance was not confined in its operation to relief given where the formalities required by that Act had been omitted, but was of general application where formalities were required by statute, and that where specific performance was asked in respect of a contract the subject-matter of which justified the application of such

relief, and the contract had been performed or part performed by the plaintiff, relief would be given in spite of the neglect of statutory formalities, lest the action should be the occasion of fraud. Certain authorities were referred to which I will deal with in a moment, but it is to be noted in the first instance that the object of the Statute of Frauds was to prevent fraud inter partes, and the principle of part performance was based upon the idea that a statute designed to prevent fraud would be misapplied in cases where the existence of a contract was so plainly to be inferred that to allow a defendant to ride off upon the statute would be to enable him to commit a fraud under cover of the very Act which was designed to prevent it. It is obvious that this reasoning is not altogether applicable to the case of an urban authority, the necessity of obtaining the seal of the authority in order to make a contract over a certain value enforceable being, it is to be inferred, imposed for the purpose of the protection of the ratepayers, and the power of the urban authority to bind them being derived from the statute which requires that power to be exercised in a particular way. Further, in dealing with the cases cited, it is important to be satisfied that they did not turn on the equitable doctrine of acquiescence, the requirements for which are defined in the case of *Willmott* v. *Barber*. (1) No case of acquiescence is made out here, the fact that both parties acted in the belief that a binding contract existed being fatal to any such contention. The cases referred to were *Wilson* v. *West Hartlepool Ry. Co.* (2), *Crook* v. *Seaford Corporation* (3), and *Marshall* v. *Queenborough Corporation*. (4) The first of these cases does not appear to me to have any very direct bearing upon this case. It goes to shew, no doubt, that in the opinion of Turner L.J. a railway company may be liable to a decree for specific performance of a contract, although not entered into in accordance with s. 97 of the Companies Clauses Act, 1845, which the learned Lord Justice holds to be directory only, and not to invalidate contracts made in other ways: see p. 496. In *Crook* v. *Seaford Corporation* (3) it appears to me upon examination of the case that relief was

(1) (1880) 15 Ch. D. 96.
(2) 2 D. J. & S. 475, 496.
(3) L. R. 10 Eq. 678.
(4) 1 S. & S. 520.

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granted on the ground of acquiescence. In *Marshall* v. *Queenborough Corporation* (1) there is a dictum by Sir John Leach V.-C. to the effect that if a regular corporate resolution was passed for granting an interest in a part of the corporate property, and upon the faith of that resolution expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution. If this be good law, upon which I express no opinion, it seems to be a long way from shewing that part performance is sufficient to take a contract out of the operation of s. 174 of the Public Health Act, 1875. In *Young & Co.* v. *Royal Leamington Spa Corporation* (2) Lord Blackburn quotes with approval the judgment of Lindley L.J. in the Court of Appeal (3) where he says: "But contracts for more than 50*l.* are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the ratepayers of that protection which Parliament intended to secure for them. The case of *Frend* v. *Dennett* (4)—and in Chancery before Page Wood V.-C. (5)—is an authority in support of this view, and was, in my opinion, rightly decided." The case before the Vice-Chancellor was a suit for specific performance and was decided upon the absence of a seal, and is, I think, an authority in favour of the view I take that in equity as well as at law no contract, although executed, for over 50*l.* in value can be enforced unless it is under seal. I must therefore dismiss the action, but having regard to the character of the defence, and the advantage the ratepayers have obtained over the plaintiff in consequence of the failure of the urban authority to affix the seal, I dismiss it without costs.

Solicitors for plaintiff: *Baker, Freeman & Co.*
Solicitors for defendants: *J. Deacon Newton & Co.*

(1) 1 S. & S. 520, 523.
(2) 8 App. Cas. 517, 522.
(3) (1882) 8 Q. B. D. 579, 585.
(4) (1858) 4 C. B. (N.S.) 576.
(5) (1861) 5 L. T. 73.

H. L. F.

PARKER J.
1912
July 3.

In re SOPER.
NAYLOR *v.* KETTLE.

[1912 S. 1621.]

Will—Construction—Gift to Nearest of Kin of Deceased Husband and Wife.

M. S., the testatrix, was the widow of W. S., who had previously been married to S. S. There was one son by the marriage of W. S. and M. S., but no issue of the former marriage. M. S. by her will gave leasehold property to the son for life, and after his decease to his lawful issue equally. In the event of his death without leaving a lawful child (which event happened) she gave the property to "the nearest of kin of my late husband W. S. and of S. S., his former wife, deceased, in equal shares and proportions." As far as was known W. S. and S. S. were not relations before marriage. S. S. left next of kin:—

Held, that the gift was to a class consisting of the nearest of kin of W. S. and the nearest of kin of S. S., and not to a class consisting of persons who were nearest of kin to both of them.

Pycroft v. *Gregory* (1829) 4 Russ. 526, distinguished.

Mary Soper by her will, made March 17, 1860, gave to her trustees all her freehold and leasehold estates and all other her real and personal estate and effects, upon trust to receive the income thereof and apply the same, first, in keeping the freeholds and leaseholds in repair and insured against fire, and to apply a portion of the income in the maintenance, education, and advancement of her son William Edward Soper until he should attain twenty-one, and thereafter to pay him the whole income during his life; and after his decease leaving lawful issue the testatrix gave the whole of her said freehold, leasehold, real and personal estates equally between them. The will then proceeded as follows: "And further in the event of the death of my said son without leaving a lawful child or children or who die in minority without leaving a lawful child or children, then I do hereby give and bequeath the whole of the leasehold property bequeathed to me by my late husband William Soper deceased unto my said dear sister Elizabeth for the term of her natural life, and at her decease then I do hereby bequeath such last mentioned leasehold property unto the nearest of kin of my said late husband William Soper deceased and of Sarah Soper, his former wife, deceased, in equal shares and proportions."

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Mary Soper died a widow in October, 1867, leaving one child only her surviving, namely, William Edward Soper, and he died a bachelor in 1911.

The trustees of the will took out an originating summons raising the questions whether the will meant (*a*) such of the nearest blood relations of both William Soper and his first wife as were living at the date of Mary Soper's death, or (*b*) such of the nearest blood relations of each of them as were living at that date, or (*c*) in either case whether such persons took per capita or per stirpes and in what degree of relationship, or (*d*) such of the next of kin according to the Statute of Distributions of both of them or each of them as were living at that date, or (*e*) what other person or persons. They also asked that the necessary inquiries might be ordered.

Galbraith, for the plaintiffs, stated the facts and the questions raised by the summons.

Romer, K.C., and *Sargant*, for the residuary legatees. The only persons who can take under the gift are those who are nearest of kin not only of William Soper but also of Sarah Soper. Under a gift to the next of kin of the testatrix's father and mother, both deceased, it was held that no person could take unless he was next of kin to both: *Pycroft* v. *Gregory*. (1)

The next of kin must be ascertained at the death of the testatrix: *Philps* v. *Evans* (2); *In re Rees*. (3)

It is unreasonable to suppose that the testatrix meant to provide for the next of kin of her late husband's former wife.

J. G. Wood, for the legal personal representatives of W. E. Soper. The words of the gift in the present case are different from those in *Pycroft* v. *Gregory*. (1) In the present case the gift is not to the nearest of kin of William and Sarah, but to the nearest of kin of William "and of" Sarah, which shews that the nearest of kin of each were to take.

PARKER J. In this case the testatrix by her will gave certain leasehold property upon certain trusts which I need not read, and

(1) 4 Russ. 526. (2) (1850) 4 De G. & Sm. 188.
(3) (1890) 44 Ch. D. 484.

on failure of the objects of those trusts she gave the leasehold property "unto the nearest of kin of my said late husband William Soper deceased and of Sarah Soper, his former wife, deceased, in equal shares and proportions." As far as is known William and Sarah were not relations, and the question which arises for my decision is whether the gift is to be read as a gift to a class consisting of the nearest of kin to William and the nearest of kin to Sarah, or whether it is to be read as a gift to a class consisting of the nearest of kin of both these persons, in which case the next of kin would have to be persons who were descended from both of them. William Soper had by the testatrix one child, William Edward Soper, for whom during his life she provides by her will, and it is only on his death without leaving lawful issue that this limitation to nearest of kin is to take effect. Sarah had undoubtedly next of kin, but who they are has not yet been ascertained.

It has been contended that the case of *Pycroft* v. *Gregory* (1) is binding on me. There there was a gift upon trust to convey lands "to the next of kin of my late father and mother, John Hardress Esq. and Tomlinson Hardress his wife, both deceased, his or her heirs or assigns for ever, and if more than one, in equal shares and proportions, and to take as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns for ever": and Lord Lyndhurst L.C. held that the testatrix meant to give the property to the descendants of the testatrix's father and mother.

Great stress was laid in that case on the fact that the gift was to the next of kin of the father and mother "his or her heirs or assigns for ever" as shewing that the testatrix contemplated that the next of kin might be one individual. In the case before me the words are different, and there are no such words as "his or her heirs or assigns for ever." Here the gift is to "the nearest of kin of my said late husband William Soper deceased and of Sarah Soper, his former wife, deceased, in equal shares and proportions," and the form of that gift makes it possible for me to decide that the testatrix meant the gift to be to the next of kin of her late husband and also the next of kin of his former

(1) 4 Russ. 526.

PARKER J. 1912 SOPER, *In re.* NAYLOR *v.* KETTLE.

wife, both sets of next of kin making a class. It is not only possible to place this construction on the gift without contradicting other decisions, but I may rest my decision on the fact that the prior gift for life to the son is quite consistent with the subsequent gift as I read it. On the other hand, it is improbable that the testatrix intended to provide for the descendants of her late husband and his former wife, as she probably knew the state of the family. The gift is in equal shares amongst a class living at the death of the testatrix, but I do not decide whether they took per stirpes or per capita.

There will be a declaration that, according to the true construction of the will, the persons entitled under the gift are the nearest of kin of William Soper and the nearest of kin of Sarah Soper, and inquiries (1.) who were the next of kin of William Soper and Sarah Soper living at his or her death respectively, and whether any and which of them were living at the death of the testatrix; and (2.) whether any and which of such next of kin have died since the death of the testatrix, and, if so, who are their respective legal personal representatives.

Solicitors for plaintiffs: *E. & J. Mote.*
Solicitors for residuary legatees: *Wilkinson, Raikes & Son.*
Solicitor for representatives of W. E. Soper: *Alfred Holmes.*

F. E.

In re SANDBROOK.
NOEL *v.* SANDBROOK.

[1912 S. 1624.]

PARKER J.
1912
July 3, 4.

Will—Construction—Condition Subsequent—Public Policy—Condition against Children living with or under the Control of their Father.

Three fourths of a testatrix's residuary estate were given upon trust to pay the income to her two grandchildren up to December 31, 1927, and then to divide the corpus between them. In case either grandchild should die before that date without leaving lawful issue his or her share was given to other persons, and the will then contained a declaration that if at any time on or before December 31, 1927, either one or both of the grandchildren should "live with or be or continue under the custody, guardianship or control of their father . . . . or be in any way directly under his control, all benefits, profits and income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control." In case of forfeiture of the interest of a grandchild under this condition his or her forfeited share was to be held upon the trusts declared on the happening of the death of the grandchild before December 31, 1927, without leaving lawful issue:—

Held, (1.) that the clause was a condition in defeasance of an interest previously given; (2.) that it was void as being contrary to public policy, because it was inserted with the object of deterring the father from performing his parental duties, and also because it was an attempt to interfere with the discretion of the Court as to the custody and maintenance of its wards; and (3.) that the condition was bad on the ground of uncertainty.

By her will, dated December 3, 1911, Harriet Pearson Sandbrook appointed executors and trustees, and, after giving certain legacies, she devised and bequeathed her residuary real and personal property to her trustees, upon trust to pay the income of one quarter share of her residuary estate and the investments representing the same to her daughter, Harriet Maud Sandbrook, for her life, and, after the death of her said daughter, in trust for the children or child of her said daughter,

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and, failing her leaving lawful issue, then upon the trusts hereinafter declared concerning the share of the testatrix's two grandchildren, William Francis Reginald Ashley Cooper and Molly Vera Ashley Cooper. And the testatrix thereby directed her trustees to stand possessed of the remaining three quarter share of her residuary estate, and (subject to the provisions thereinafter contained) to pay the income thereof and the investments representing the same to her said two grandchildren "up to and including the 31st day of December, 1927, in equal shares, and shall, immediately after the 31st day of December, 1927, divide between them my said two grandchildren the capital sum representing the three quarter share of the whole of my residuary estate, and, if my said two grandchildren or either of them shall die before the 31st day of December, 1927, or shall die in my lifetime after that date without leaving lawful issue surviving me, then my trustees shall hold the share of my said grandchildren or either of them, or so much thereof as shall not have been applied or disposed of under the trusts or powers of this my will or by law vested in my trustees, upon the trusts herein declared of and concerning my said daughter and my other grandchild in equal shares or to the survivor of them."

The will afterwards proceeded as follows: "And I declare that if, at any time on or before the 31st day of December, 1927, either one or both of my grandchildren shall live with or be or continue under the custody, guardianship or control of their father, Doctor T. G. Duncan Cooper, or be in any way directly under his control, all benefits, profits and income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control. And in case either one or both of my grandchildren shall forfeit any interest under this my will under the conditions lastly hereinbefore contained, their shares or his or her share so forfeited shall be held by my trustees upon the trusts hereinbefore declared upon the happening of the death of my grandchildren

or either of them before the 31st day of December, 1927, without leaving lawful issue."

The testatrix having died in December, 1911, her will was proved in February, 1912.

William F. R. A. Cooper was born on November 19, 1897, and Molly Vera A. Cooper was born on May 9, 1899. Their mother died in 1902, and from that time they were under the control and care of their maternal grandmother, the testatrix, until her death. Ever since that time they had been living with their aunt, Harriet Maud Sandbrook. Dr. Cooper, their father, was a medical officer at Perak in the Federated Malay States, and when the summons below mentioned was issued he was in England on leave. There was evidence that he would remain in England for another eleven months, and that thereafter at the end of every two years' service abroad he would be in England on leave for six months. He desired that his children should reside with him, at any rate during part of the time when he was home on leave, and did not wish to renounce his parental rights, but, on the other hand, he did not wish to do anything which would prejudice the benefits to which the children were entitled under the will of the testatrix.

Under these circumstances the executors and trustees took out an originating summons for the determination of the question (amongst others) whether, upon the true construction of the will and in the events which had happened, the gift over on the grandchildren living with, or being or continuing under the custody, guardianship, or control of, their father was already effective, or would become so if the father should insist on his children living with him.

The summons was adjourned into Court before Parker J.

C. J. Mathew, for the applicants, stated the facts and the questions raised for decision.

T. J. C. Tomlin, for W. F. R. A. Cooper and M. V. A. Cooper, the grandchildren. The condition imposed with regard to the grandchildren's shares is a condition subsequent and is invalid on three grounds: (1.) because it is contrary to public policy, being an attempt to oust their father's parental authority; (2.) because

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it is contrary to public policy as an attempt to oust the Court's jurisdiction; and (3.) because of its uncertainty, as it cannot be ascertained now what events will cause a forfeiture of the gifts.

As regards (1.), it is well settled that a father has the right to the control of his children and cannot contract himself out of that right: *Humphrys* v. *Polak* (1); *Reg.* v. *Barnardo.* (2)

The following passage applies to the condition: "All conditions annexed to estates, being compulsory to compel a man to do any thing that is in its nature good or indifferent, or being restrictive to restrain or forbid the doing of any thing which in its nature is malum in se, as to kill a man, or the like, or malum prohibitum, being a thing forbidden by any statute, or the like, all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void": Sheppard's Touchstone, p. 132. A father is recognized by law as having authority over his child until the latter attains the age of twenty-one years: *In re Agar-Ellis.* (3)

As regards (2.), the condition is void as being against the liberty of the law. It is an attempt to fetter the jurisdiction of the Court. The Court might, on an application as to the custody or maintenance of the children, direct them to be placed in their father's care and custody; but if the condition were good, the order would cause a forfeiture of the children's interest under the will.

As regards (3.), the condition is void for uncertainty, the language being so vague that it is impossible to say with certainty what events would cause a forfeiture of the interests: *In re Viscount Exmouth* (4); *Clavering* v. *Ellison.* (5)

H. Burrows, for Harriet Maud Sandbrook. Miss Sandbrook is entitled to a part of the grandchildren's share in the event of their forfeiting their interest. The clause attacked is valid. The corpus is not taken by the grandchildren until 1927, and the clause only affects the income and is not a condition subsequent. The result is only what would happen if they died before 1927,

(1) [1901] 2 K. B. 385.
(2) (1889) 23 Q. B. D. 305.
(3) (1883) 24 Ch. D. 317.
(4) (1883) 23 Ch. D. 158.
(5) (1859) 7 H. L. C. 707.

and their death before then is not a condition subsequent. The construction which ought to be placed on the will is that there is a limitation of income on trust until a certain event happens, and then a contingent trust of corpus for one person or another, according to which event happens. If this is the true construction, there is no question as to public policy.

L. F. Potts, for persons in the same interest. If the clause is a condition, it is a valid one. The jurisdiction of the Court is not ousted. Obedience to an order of the Court that the children were to live with their father would not be a breach of the condition, but a case of vis major.

PARKER J. In this case the testatrix, Harriet Pearson Sandbrook, by her will gave her residuary estate upon trust for sale and conversion, and, as to one fourth of it, it was to be held upon trust for her daughter, Harriet Maud Sandbrook, for life, with limitations after her death in favour of her children, and, as to the remaining three fourths of the residuary estate, subject to the provisions thereinafter declared—to which I will refer presently—the trustees were to pay the income thereof to the testatrix's two grandchildren, being the children of a deceased daughter, "up to and including the 31st day of December, 1927, in equal shares, and shall, immediately after the 31st day of December, 1927, divide between them, my said two grandchildren, the capital sum representing the three quarter share of the whole of my residuary estate, and, if my said two grandchildren or either of them shall die before the 31st day of December, 1927, or shall die in my lifetime after that date, without leaving lawful issue surviving me, then my trustees shall hold the share of my said grandchildren or either of them, or so much thereof as shall not have been applied or disposed of under the trusts or powers of this my will or by law vested in my trustees, upon the trusts herein declared of and concerning my said daughter and my other grandchild in equal shares or to the survivor of them." There is a difficulty about construing that gift, but it seems to have been assumed that the meaning is that the share of any child dying and not leaving issue within the period mentioned is to go upon the trusts of the one fourth left to Harrie-

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and of the half of the three fourths left to the other child. I do not actually determine anything on that point because I do not think the question arises now for determination.

Then there is this clause in the will: [His Lordship read the forfeiture clause as set out at p. 472, above.]

The first point that arises on the construction of that clause is this: Is it a condition in defeasance of what has been already given, or can I construe the will as creating a limitation in favour of these children until the arrival of the date mentioned or until the happening of some earlier event? In my opinion, it is framed entirely as a condition defeating the interest already given, and it would be a violent construction of the instrument as a whole to say that it was not a condition in defeasance of what has been already given but a limitation until a certain thing has happened. Then, if it is a condition in defeasance of what has already been given, the question arises as to whether it is a valid condition to which I can give effect. I have come to the conclusion that Mr. Tomlin's argument is right in every respect. It appears to me that this condition is inserted in the will with the direct object of deterring the father of these two children from performing his parental duties with regard to them, because it makes their worldly welfare dependent on his abstaining from doing what it is certainly his duty to do, namely, to bring his influence to bear and not give up his right to the custody, the control and education of his children; and it seems to me it is also a direct consequence of a condition of this sort that the discretion of the Court with regard to the custody and maintenance of its wards is equally interfered with. If, for example, I myself—these children being now wards—thought it was for their benefit to direct that they should spend the next year or so with their father (who is a medical officer on furlough from the Malay States) at the seaside under his direct control, I should be fettered in exercising the discretion vested in me by the knowledge that, if I exercised it in this way, I might endanger their worldly welfare and cause them to forfeit what has been given them under the will.

It appears to me, therefore, that the condition is directly within the principle, as laid down at p. 132 of Sheppard's

Touchstone, that a condition is bad which operates to restrain or forbid a man from doing his duty. I am also of opinion that the condition itself is bad for another reason. It appears to me to be bad on the ground of uncertainty, for, as has been laid down by the House of Lords in the case of *Clavering* v. *Ellison* (1), conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the Court can say with reasonable certainty in what events the forfeiture will occur. Now in the present case the forfeiture is to occur in several events, the first of which is, if either or both of these grandchildren shall live with their father. It appears to me that that expression, "live with their father," is exceedingly vague, and it is difficult for me to put upon it a definite meaning or to arrive with certainty at any conception of the event which would cause the forfeiture. It seems to imply a certain degree of permanence of residence. Take, for instance, what I said just now. Suppose I were to direct the children to live with their father at the seaside during his furlough—say for a couple of years or one year—I should hesitate to say that that was living with the father within the meaning of this will. Suppose the father got an extension of leave and during the extension of leave I sanctioned their living with him again—would that make any difference? Ultimately the father might be sick and unable to go back, and they might stay on and nurse their father—would that be living with him? It would be impossible to say at what point the living with their father became living of such a nature that the forfeiture as contemplated by this will occurred.

That, I think, brings the case within the precise circumstances which were dealt with in *Clavering* v. *Ellison* (1), where the condition was that the children should be educated in England, and the question was, what amount of residence abroad and what tuition abroad would prevent their being educated in England within the meaning of the condition. One at any rate of the noble Lords responsible for the decision in that case came to the conclusion that, that being so, the condition was too vague to be enforced. And I gather that Fry J. in the case of *In re Viscount Exmouth* (2) took the same view, and considered

(1) 7 H. L. C. 707. (2) 23 Ch. D. 158.

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that the condition which Lord Cranworth had considered bad in the House of Lords must, having regard to the subsequent cases which had fallen to be decided, be a condition too vague to be enforced by the Court.

The condition in the present case is that the forfeiture is to occur if the children or one of them be or continue under the custody, guardianship, or control of their father. As a matter of law, the children always have been in the custody, control, and guardianship of their father, although he himself, having been absent abroad, has delegated the duty he owed to them at first to the grandmother, the testatrix in the case, and subsequently to Miss Sandbrook, who, under the will of the grandmother, is the person designated as the person with whom the grandmother would wish them to live. Having regard to the words used, it seems difficult to say whether the events which have happened have caused or what further degree of interference by the father may cause the forfeiture to happen, and, in a similar way, it is very difficult to interpret with any reasonable certainty what is meant by the children being directly under the father's control. That becomes the more difficult to ascertain from the fact that it is to be an essential condition that the children are to live free from the father's direct influence and control. Is it to be said that if a father writes to his child, he is not exercising direct influence over him? It appears to me that the father would by correspondence be directly influencing the child, as he would personally influence him by living with him. It appears to me almost impossible for a father who sees his child at all not to exercise direct personal influence.

Having regard to all those circumstances, it appears to me that this condition is open to about every objection to which it could be open. It is open to the objection of being void because it is contrary to public policy, and it is also open to the objection of being void because it is so vague. I am prepared to declare that, according to the true construction of the will, the condition is altogether bad.

Solicitors for all parties: *Davenport, Cunliffe & Blake, for Yorath & Jones, Cardiff.*

F. E.

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In re YOUNG.
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[1912 Y. 328.]

Will—Construction—Annuity—Charge on Income or Capital—Trust to pay out of Income—Gift of Corpus "subject to the said annuities."

A testator gave his real and personal estate to trustees, upon trust for sale and investment, and to hold the investments in trust, out of the income thereof, to pay two annuities to the annuitants for their respective lives, and upon further trust to accumulate the residue of the income until the youngest child of J. should attain the age of twenty-one years, or until the expiration of twenty-one years from the testator's death, whichever should first happen, and after the attainment of the age aforesaid by the youngest child of J. or the expiration of the term, which should first happen, the testator directed his trustees to hold the trust fund and accumulations, "subject nevertheless to the said annuities," in trust for the children of J. then living and the children of any deceased children per stirpes. The will also empowered the trustees to apply the income of the share of a child or grandchild of J. in the trust fund or the accumulations thereof, "subject to and after payment of the annuities," for or towards the maintenance of the child or grandchild, and, "subject to providing for the said annuities," to raise a part of the expectant, presumptive, or vested share of a child or grandchild in the trust fund and the accumulations, and to pay or apply the same for his benefit:—

Held, that, notwithstanding the direction to accumulate the residue of the income, the annuities were a charge upon the corpus.

Taylor v. *Taylor* (1874) L. R. 17 Eq. 324, must be taken to have been overruled by *In re Howarth* [1909] 2 Ch. 19.

Quære, whether there is any difference between a charge on corpus and a continuing charge on income.

William Young, by his will dated October 29, 1891, appointed George Goodwin and Abraham Dalby executors and trustees thereof, and devised and bequeathed all his real and personal estate to them, their heirs, executors, administrators, and assigns, upon trust to sell the same and out of the proceeds of sale to pay his funeral and testamentary expenses and debts, and to invest the residue of such moneys and to stand possessed of the residuary moneys and the investments (thereinafter called "the residuary trust funds") "Upon the trusts hereinafter declared concerning the same, that is to say, In trust out of the

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income of the residuary trust funds to pay an annuity of 150*l.* to my friend Gertrude Meaguire (the sister of my present wife Kate Ida Young), and an annuity of 52*l.* to my friend Lydia Leach (the sister of my late wife Sophia Young) during their respective lives, such respective annuities to commence from my death and to be payable quarterly, and the first payment thereof to be made at the expiration of three calendar months from my death, and so that the said respective annuities shall be for the separate use of the said Gertrude Meaguire and Lydia Leach respectively without power of anticipation, And upon further trust, subject as hereinafter mentioned, to accumulate the residue of the income of the residuary trust funds in the way of compound interest by investing the same and the resulting income thereof in manner hereinafter mentioned until the youngest child of my brother John Young . . . . shall attain the age of twenty-one years or until the expiration of twenty-one years from my death whichever event shall first happen. And from and after the attainment of the age of twenty-one years by the youngest child of my said brother as aforesaid, or from and after the expiration of twenty-one years from my decease, which shall first happen, my trustees or trustee shall stand possessed of the residuary trust funds and the accumulations of interest thereon, subject nevertheless to the said annuities of 150*l.* and 52*l.* respectively, In trust for all or any the child or children of my said brother John Young then living and the child or children then living of any then deceased child or children of the said John Young who being male attain the age of twenty-one years or being female attain that age or marry, if more than one in equal shares, but so that the children of any child or children of the said John Young shall take equally between them the share which their parent would have taken had he or she been living and attained the age of twenty-one years."

Then followed immediately a proviso and declaration that "notwithstanding anything hereinbefore contained my trustees or trustee may apply the whole, or such part as they or he in their or his discretion shall think fit, of the income of the expectant presumptive or vested share of any child or grandchild of the said John Young in the residuary trust fund or the

accumulations thereof under the trusts hereinbefore contained, subject to and after payment of the annuities hereinbefore bequeathed, or a proportionate part thereof, for or towards his or her maintenance, education or benefit," whether such child or grandchild was a minor or not.

The will then proceeded as follows: "And I authorise my trustees or trustee in their discretion, subject to providing for the said annuities, to raise any part or parts not exceeding in the whole a moiety of the expectant, presumptive, or vested share of any child or grandchild of the said John Young in the residuary trust funds and the accumulations thereof under the trusts hereinbefore contained," and to pay or apply the same for his benefit.

An originating summons was taken out for the determination of the questions whether the annuities were charged on the corpus of the testator's estate or on the income only, and, if charged on income only, whether they were a continual charge on the income or only on the income year by year.

Warwick Draper, for the applicants, stated the facts and the questions involved.

Harry Greenwood, for the annuitants. The annuities are charged on the corpus. After the gift of the annuities, there is a direction to accumulate the residue of the income, and then the trust funds and accumulations are given over in trust for other persons, but "subject nevertheless to the said annuities.' Then the power of maintenance is "subject to and after payment of the annuities hereinbefore bequeathed, or a proportionate part thereof," and the advancement clause is "subject to providing for the said annuities." Although a will expressly makes annuities payable out of income, if the estate out of the income of which they are payable is given "subject to the annuities" the annuities are charged on the corpus: *In re Howarth*. (1) That is a decision of the Court of Appeal which is binding on this Court. Where residuary estate was given upon trust for realization and investment, and out of the income to pay certain annuities, and subject thereto to pay the income to another person for

(1) [1909] 2 Ch. 19.

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life, and "subject to the trusts aforesaid" to hold the trust premises and the income thereof in trust for certain other persons, Neville J. held that the annuities were not charged upon the corpus and were not a continuing charge upon income: *In re Bigge.* (1) But this decision was overruled by the Court of Appeal in *In re Watkins' Settlement.* (2)

[PARKER J. What is the difference between a continuing charge on income and a charge on capital?]

The difference is only academic.

Where property was directed to be converted and invested by trustees who "out of the interest, dividends, and annual proceeds thereof" were to "levy and raise the annual sum of 100*l.*" and pay it to a person for life, "and from and after the payment of the said annual sum of 100*l.* and subject thereto" the trustees were to stand possessed of the property upon certain trusts, the Court of Appeal held that a deficiency in the income must be paid out of corpus: *Birch* v. *Sherratt.* (3)

My opponents may rely on *In re Boden* (4), but there the words were "subject to the trusts aforesaid," and on the particular words of the will in that case it was held that the trust referred to was to pay out of income. The case was distinguished in *In re Howarth.* (5) [He also referred to *In re Boulcott's Settlement.* (6)]

W. J. Whittaker, for the residuary legatees. The annuities are payable out of income only. On words very similar to those of the present will, Hall V.-C. held that the corpus was not charged: *Taylor* v. *Taylor.* (7)

[*J. G. Wood*, amicus curiæ. In *Hambro* v. *Hambro* (8) North J. commented adversely on *Taylor* v. *Taylor.* (7)]

Hall V.-C. referred to *Taylor* v. *Taylor* (7) in *Horton* v. *Hall* (9), but in the former case the gift of corpus was certainly "subject nevertheless to and charged with the payment of" the annuities. The definite gift of residue, both capital and accumulations,

(1) [1907] 1 Ch. 714.
(2) [1911] 1 Ch. 1.
(3) (1867) L. R. 2 Ch. 644.
(4) [1907] 1 Ch. 132.
(5) [1909] 2 Ch. 19.
(6) (1911) 104 L. T. 205.
(7) L. R. 17 Eq. 324.
(8) [1894] 2 Ch. 564, 569.
(9) (1874) L. R. 17 Eq. 437, 438.

excludes the possibility of a charge on corpus. In *In re Howarth* (1) there was not, as in this case, a trust to accumulate the income remaining after paying the annuities.

In *In re Boden* (2) Buckley L.J. says: "If the words of the original gift do not amount to a gift out of corpus, the words of the gift over do not make it such, and do not convert the gift out of the income of a fund into a gift charged upon corpus, whether there be a fund of income or not."

[He also referred to *Darbon* v. *Rickards* (3); *Salvin* v. *Weston* (4); *Wormald* v. *Muzeen* (5); *Stelfox* v. *Sugden.* (6)]

Owen Evans, for an assignee of certain shares in the residue. I adopt the argument on behalf of the residuary legatees. The words in the maintenance clause shew that the corpus was meant to be kept intact, and on the whole will an intention is clearly shewn that only the income should be charged with payment of the annuities.

Harry Greenwood in reply.

PARKER J. This is a summons taken out in order to obtain the decision of the Court on the question whether certain annuities are charged on the corpus of the testator's estate or on the income only, and if charged on income only, whether they are a continuing charge on the income or only on the income year by year.

The scheme of the will is quite simple. The testator gave his residuary trust funds to his trustees, in trust out of the income thereof to pay an annuity of 150*l.* to his friend Gertrude Meaguire and an annuity of 52*l.* to his friend Lydia Leach during their respective lives. Then there is a trust for the accumulation of the residue of the income until the youngest child of the testator's brother John Young attains the age of twenty-one years or until twenty-one years from the testator's death, whichever event first happens. Then the will provides that after the happening of either of these events the trustees are to hold the residuary trust funds and the accumulations of

(1) [1909] 2 Ch. 19.
(2) [1907] 1 Ch. 132, 156.
(3) (1845) 14 Sim. 537.
(4) (1866) 14 W. R. 757.
(5) (1881) 29 W. R. 795.
(6) (1859) John. 234.

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interest thereon, "subject nevertheless to the said annuities of 150*l.* and 52*l.* respectively," in trust for all or any the children of John Young then living and the child or children then living of any then deceased child or children of John Young who being male attain the age of twenty-one years or being female attain that age or marry. Then comes a proviso for the application of the whole or part of the income of the expectant, presumptive, or vested share of any child or grandchild of John Young in the residuary trust funds or the accumulations thereof, "subject to and after payment of the annuities," for the maintenance of such child or grandchild, and this is followed by a power of advancement to a child or grandchild, which again is "subject to providing for the said annuities."

It does not seem desirable that I should go into all the cases cited to me in detail or draw fine distinctions, but I think I should attempt to find the principles which ought to guide the Court.

In the first part of the gift there is nothing to shew that the annuities are to be paid otherwise than out of income, but the next gift is made expressly subject to the said annuities of 150*l.* and 52*l.*, and that means that the legatees of the residuary funds are not to take until the annuities have been paid, and charges the annuities upon the corpus of the estate. That is clear from *In re Howarth* (1), which is the leading modern case on this subject. In that case the testator gave his real and his residuary personal estate upon trust for sale and conversion, and to hold the proceeds "upon trust to pay out of the income thereof the sums following that is to say" one clear annuity to each of the three defendants, and "subject to the aforesaid annuities" the testator directed that the fund should be held upon trust for his brother absolutely; and the Court of Appeal held that, having regard to the terms of the gift over, the annuities were charged on the corpus. Cozens-Hardy M.R. distinguished *In re Boden* (2), which was in some respects a very similar case. There the property was given upon trust for sale, conversion, and investment, and in a certain event to pay the testator's wife such a sum "out of the income of my residuary trust funds as

(1) [1909] 2 Ch. 19 (2) [1907] 1 Ch. 132.

with the income which my said wife shall from time to time receive under or by virtue" of a settlement "shall make up the total annual income of 8000*l.*"; but in a certain other event "upon trust to pay to her during her life such further sum as with the income to be derived from the said settlement shall make up the annual sum of 10,000*l.*," and "subject to the trusts aforesaid in trust to divide my said residuary trust funds unto and equally between all and every my children who shall attain twenty-one or marry," and if there should be no such child, "then, subject to the trusts aforesaid, I give and bequeath the same unto my nephew." The question arose as to whether the annuity of 10,000*l.* was payable only out of income or was charged on the corpus, and the majority of the Court held that "subject to the trusts aforesaid" meant subject to the trust to pay the annuities out of income. The only distinction between the present case and *In re Howarth* (1) is that here there is a trust for the accumulation during the infancy of the youngest child of John Young of the residue of the income after paying the annuities, and that, taking the first part of the gift alone, might be conclusive that the testator did not want his capital to be resorted to for payment of the annuities; but apart from that there is nothing to distinguish this case from *In re Howarth.* (1)

The only difficulty arises on an earlier case of *Taylor* v. *Taylor* (2), which in effect is analogous to the present case. There the testator gave his residuary real and personal estate to trustees for the term of eleven years after his decease, upon trust to pay, out of the rents, interest, dividends, and proceeds arising therefrom, certain life annuities, and he directed that the residue of the rents, interest, dividends, and proceeds should during the term be accumulated for the benefit of the person who should become entitled to the residue of the personalty on the expiration of the term, and after the determination of the term he devised his real estate, "subject nevertheless to and charged with the payment of" the annuities for the residue of the lives of the annuitants, with powers of entry and distress for the recovery of the same, in strict settlement. The annuities were paid during the term, but after its expiration they fell into

(1) [1909] 2 Ch. 19. (2) L. R. 17 Eq. 324.

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arrear, and the case came before Hall V.-C. on a petition by the annuitants for a sale of the real estate to pay the arrears. The Vice-Chancellor held that the annuities were not charged upon the corpus and refused to order a sale, apparently because the land was devised in strict settlement; that that was the reason appears from the Vice-Chancellor's judgment in *Horton* v. *Hall.* (1) But for the purpose of his decision in *Taylor* v. *Taylor* (2) Hall V.-C. went into the question whether the corpus was charged with the annuities, and he said: "These payments are unquestionably to be made out of income for eleven years, and it is impossible to successfully argue upon the language used so far, that the annuities are a charge upon the corpus. The question is whether, under the subsequent disposition, the annuities or the arrears, in case of there being any, could be raised out of the corpus by a sale or mortgage; for the contention on the part of the petitioners goes to that length. Considering this case free from authority, what is this disposition? It is the ordinary case of a testator devising his estate in strict settlement—to one person for life with remainders over—and saying that those persons are to take the estate subject to the payment of certain annual sums, and to the annuitants he gives powers of distress and entry for the recovery of those sums as if the same had been secured by a lease for years. There is nothing in the terms of the gift which enables me to say that the annuities are charged upon the corpus; and taking them out of the corpus might lead to considerable confusion." Then he comes to the conclusion that the annuities are a continuing charge on income only. Now it may in some cases be necessary to distinguish between a perpetual charge on income and a charge on capital, but I should have thought that, after the case before North J. of *Hambro* v. *Hambro* (3), for the purposes of raising arrears of an annuity which was a continuing charge on income, the matter was in the same position as if there were a charge on corpus.

I cannot see why, on principle, the slight variation between *In re Howarth* (4) and this case can make any difference. But

(1) L. R. 17 Eq. 437, 438.
(2) L. R. 17 Eq. 324, 327.
(3) [1894] 2 Ch. 564.
(4) [1909] 2 Ch. 19.

as regards *Taylor* v. *Taylor* (1) I cannot see that Hall V.-C. dealt with the point, that the real estate was devised "subject nevertheless to and charged with the payment of" the annuities, which was dealt with in *In re Howarth* (2), and I am bound to follow *In re Howarth* (2) and to treat *Taylor* v. *Taylor* (1) as overruled by that case.

I hold, therefore, that the annuities are charged on the corpus. If that were not the case, I should think there was a continuing charge on the income, and that the Court could in that case direct a sale; but I need not decide that question because I hold that there is a charge on the corpus.

Solicitors for the applicants and the assignee of a share in residue: *Fielder, Jones & Harrison, for H. E. W. Fox, Bradford.*

Solicitor for the annuitants: *S. S. Seal, for Sugden & Dewhirst, Bradford.*

Solicitor for the residuary legatees: *F. B. Brook, for Gaunt, Hines & Bottomley, Bradford.*

(1) L. R. 17 Eq. 324. (2) [1909] 2 Ch. 19.

F. E.

eferred to. *In re* LUCAS. [1948] 1 Ch. 175
pplied. *Re* LUCAS. [1948 Ch. 424

C. A.
1912
July 8.

In re FARAKER.
FARAKER *v.* DURELL.

[1911 F. 1658.]

Will—Charitable Legacy—Lapse—Scheme—Alteration of Objects of Charity—Destruction of Endowed Charity—Parties—Attorney-General's Right to Appeal.

Mrs. Faraker, who died in 1911, gave by her will a legacy of 200*l.* "to Mrs. Bailey's Charity, Rotherhithe." There was at Rotherhithe a charity known as Hannah Bayly's Charity, founded in 1756 by a Mrs. Bayly for the benefit of poor widows resident in and parishioners of St. Mary, Rotherhithe. In 1905 the Charity Commissioners sealed a scheme in the matter of the Charity of Hannah Bayly's Charity and thirteen other charities in Rotherhithe whereby the endowments of all these charities were consolidated, trustees were appointed, and trusts declared for the benefit of the poor of Rotherhithe. There was no mention of widows in the scheme.

Mrs. Faraker's executors took out a summons against the trustees of the consolidated charities and a residuary legatee to determine whether the legacy had lapsed. No question was raised on the spelling of the name Bayly.

Neville J. held that Hannah Bayly's Charity had ceased to exist and the legacy had lapsed.

The Attorney-General was not a party to the summons, but he now appealed by special leave granted by the Court of Appeal:—

Held, reversing the decision of Neville J., that the Attorney-General had a right to be a party to the proceedings and to appeal, although the trustees of the consolidated charities had been present and had argued the question in the Court below; that Hannah Bayly's Charity was an endowed charity and could not be destroyed and was not extinct, although its objects had been changed in accordance with law; and that the consolidated charities were entitled to the legacy. The Court also expressed the opinion that a specific provision for widows ought not to have been omitted from the scheme, and suggested that an application should be made to amend the scheme by inserting such a provision.

APPEAL from a decision of Neville J.

Mrs. Faraker, who died in October, 1911, gave by her will a legacy in the following terms:—"I also give to Mrs. Bailey's Charity Rotherhithe a legacy of 200*l.* and I direct that the receipt of the treasurer thereof for the time being shall be a sufficient discharge for such legacy." There was said to be no

charity known as "Mrs. Bailey's Charity, Rotherhithe," but there was a charity at Rotherhithe known as "Hannah Bayly's Charity," which had been founded by Mrs. Hannah Bayly, who died in 1756. By her will she gave the residue of her estate and effects of what nature or kind soever to trustees upon trust immediately after the same should be converted into money to dispose of the same "amongst such poor unhappy objects who shall be widows resident in and parishioners of St. Mary Rotherhithe aforesaid as to them shall seem meet." The residue amounted to a considerable sum and was invested and applied by the trustees in accordance with the trusts of the will. After their deaths the money came into other hands and was partly misapplied, and in 1813 the Master of the Rolls ordered an account of the property belonging to the charity and that the Master should approve of a scheme for the application of the funds according to the directions contained in the will of Hannah Bayly, and that certain investments should be transferred into Court. This was done, and 5055*l.* 8*s.* 4*d.* Three per cent. Annuities were transferred into Court. By a further order of May 25, 1814, it was ordered that a sum of 765*l.* 7*s.* 9*d.* should be paid into Court and invested in annuities; that a scheme which had been prepared should be approved; and that the dividends should be paid to the person to be appointed clerk to be applied for the purposes mentioned in the Master's report. The scheme as settled by the Court provided for the appointment of certain inhabitants of Rotherhithe together with the rector, curate, and churchwardens of the parish for the time being to be trustees of the charity, and for the appointment of a clerk thereof, who should receive the interest and dividends half-yearly on the trust funds; that there should be paid to thirty widows, or as near that number as the funds would permit, being resident parishioners not having received or receiving parish relief of the age of fifty or upwards, 5*l.* each by two equal half-yearly payments upon January 20 and July 20, preferring as near as might be the most needy and most deserving; and that every distribution should be made by the votes of the majority of the trustees present at a meeting to be held as therein directed.

On November 14, 1905, the Charity Commissioners sealed a

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scheme in the matter of the charity of the said Hannah Bayly and of thirteen other charities therein mentioned in the ancient parish of Rotherhithe. This scheme provided that these charities and their endowments specified in the schedule thereto and all other the endowments (if any) of the charities should be consolidated and administered and managed by the body of trustees thereinafter constituted subject to and in conformity with the provisions of the scheme under the title of the consolidated charities; that any freehold or leasehold lands comprised in the scheme should be invested in the Official Trustee of Charity Lands; and that all sums of stock comprised in the scheme should be transferred into the names of the Official Trustees of Charitable Funds. The trustees were to consist of sixteen persons, namely, one ex officio trustee, the rector of Rotherhithe, seven representative trustees to be appointed by the council of the borough of Bermondsey from the councillors representing on that body the wards of the parish of Rotherhithe, and eight co-optative trustees. Part of the yearly income after payment of expenses was to be applied for the benefit of the poor of Rotherhithe or of such deserving and necessitous persons residing therein as the trustees should select and in such way as they should consider most advantageous to the recipients and most conducive to the formation of provident habits, namely, (1.) contributions to an amount not exceeding 50*l.* in any one year towards defraying the cost of providing proper care and supervision (including any necessary cost of locomotion) for poor children requiring temporary change of air or special protection or treatment; (2.) the supply of clothes, linen, bedding, fuel, tools, medical or other aid in sickness or convalescence, and food or other articles in kind to an amount not exceeding 100*l.* in any one year. The scheme also provided that the trustees should appropriate a yearly sum of 30*l.* for application for the benefit of such poor as aforesaid in the supply of temporary relief in money or otherwise in cases of unexpected loss or sudden destitution, and that subject as aforesaid the yearly income of the charities should be applied for the benefit of pensioners as thereinafter prescribed, but that the appointment of pensioners under the scheme should be made without prejudice to the interests of existing pensioners if any. The pensioners

were to be poor persons of good character resident in the parish of Rotherhithe who were not at the date of their application in receipt of poor law relief, who from age, ill-health, accident, or infirmity were wholly or in part unable to maintain themselves, and who had resided in the parish for not less than ten years; and it was provided that there should be paid to each pensioner not less than 6*s.* a week and not more than 10*s.* a week, granted for a term of three years, which might be prolonged by the trustees. There was no mention of widows in the scheme.

In the schedule to the scheme the endowment of Hannah Bayly's Charity was said to consist of 6275*l.* 0*s.* 11*d.* Consols. At the date of the sealing of the scheme twenty-seven widows were receiving pensions of 5*l.* a year from Hannah Bayly's Charity. These pensions were continued under the scheme and increased to 6*s.* a week; and there were now sixteen of these pensioned widows.

It was stated that Mrs. Faraker had been born and formerly resided at Rotherhithe and her father was a trustee of Hannah Bayly's Charity. Her executors took out this summons against the trustees of the consolidated charities and Mrs. Ada Louisa Mason, one of the residuary legatees under the will of Mrs. Faraker, to determine whether the legacy of 200*l.* bequeathed to Mrs. Bailey's Charity had lapsed, and, if not, to whom it was payable. No question was raised as to the spelling of the name Bailey, and it was admitted that Hannah Bayly's Charity was intended by the testatrix.

Neville J. made an order declaring that the legacy had lapsed on the ground that the constitution of Hannah Bayly's Charity had been so altered that it must be taken to be no longer in existence. The trustees of the consolidated charities claimed the legacy in the Court below, but did not appeal.

The Attorney-General was not a party to the proceedings before Neville J., but, by special leave granted by the Court of Appeal, subject to any objection on the part of the respondent, he now, at the instigation of the Charity Commissioners, appealed from his Lordship's decision. The notice of appeal asked that the order might be reversed or varied and that such other order might be made in lieu thereof as the Court should think fit.

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Sargant, for the Attorney-General. The Attorney-General has a right to appear where he thinks the case of public importance. He "is a necessary party to all suits for charitable funds, except where a legacy is given to the officer of an established institution as part of its general funds": *Wellbeloved* v. *Jones*. (1) If we succeed the costs will come out of the charity funds. If we fail the Attorney-General will make a recommendation to the Treasury on the subject.

H. M. Humphry, for the residuary legatee. We take the preliminary objection that the Attorney-General is not entitled to appeal. He does not contend that the legacy is applicable generally to charitable purposes, but that the trustees of the consolidated charities are entitled to it.

[FARWELL L.J. The Attorney-General does not always appear, but theoretically he has the right to appear on all questions relating to charities. The King looks after all charities by his officer the Attorney-General.

COZENS-HARDY M.R. The Attorney-General could commence a fresh action, notwithstanding the decree, for a declaration that this was a general charity.]

Yes; but that is not what he asks for now. He is only appealing in the place of the trustees of the consolidated charities. Where a proper person represents a charity in the Court below and argues the case, if an appeal is to be permitted that particular person, whether a trustee or not, ought to appeal, because then if he fails the other side get their costs.

A. J. Spencer, for the executors.

COZENS-HARDY M.R. The Attorney-General must have leave to appeal.

Sargant, on the merits of the appeal. There is no reported case in which an endowed charity has been held to have ceased to exist. Neither the Court nor the Charity Commissioners can destroy a charity. It may be that the scheme ought to provide for the funds of Hannah Bayly's Charity being applied for the benefit of widows, but that omission can be rectified by the

(1) (1822) 1 S. & S. 40.

Court: *In re Betton's Charity* (1); *In re Sutton Coldfield Grammar School.* (2)

H. M. Humphry. The legacy was given to a charity for the benefit of widows only. The objects of Hannah Bayly's Charity have come to an end; its funds are no longer devoted to widows. The 200*l.* would, if paid to the consolidated charities, be applied to purposes not contemplated by the testatrix. At her death there was no charity in existence which was entitled to receive the legacy. The Court has no jurisdiction to modify the constitution of some different charity so as to enable it to take the legacy. The Charity Commissioners cannot be heard to say that the charity still exists, for they have themselves put an end to it: *In re Ovey* (3); *In re Joy.* (4) Modification of a scheme ex post facto cannot affect the language of a will.

Sargant in reply. Lapse does not apply to an endowed charity whose endowment continues to exist. Hannah Bayly's Charity still exists; it has only been amalgamated with thirteen other charities, and widows will benefit by sharing in the funds of those charities. The will does not mention widows at all.

COZENS-HARDY M.R. stated the facts and proceeded. The learned judge in the Court below has taken the view that this gift lapses and fails altogether, that Hannah Bayly's Charity is extinct, there is no such thing, its objects have entirely changed, and it has lapsed and gone. With great respect to the learned judge I am unable to accept that view. Hannah Bayly's Charity is not extinct, it is not dead, and I go further and say it cannot die. Its objects may be changed, though not otherwise than in accordance with law: they may be changed either by the Court of Chancery in its own jurisdiction over charities or by schemes formed by the Charity Commissioners, to whom Parliament has entrusted that particular duty. Subject to that lawful alteration by competent authority of the objects, Hannah Bayly's Charity is not extinct, it exists just as much as it did when the testatrix died in 1756, as it did when there were changes made in 1814, and as it does to-day.

(1) [1908] 1 Ch. 205.
(2) (1881) 7 App. Cas. 91.
(3) (1885) 29 Ch. D. 560.
(4) (1888) 60 L. T. 175.

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Cozens-Hardy M.R.

Now it is to be remembered, as has been pointed out by Kennedy L.J., that this legacy was not given to Mrs. Bayly's Charity for widows; it was simply given to a charity which is identified by name. It was given to an ancient endowed charity, and in my opinion a gift of that kind carries with it the application of it according to the lawful objects of the charity funds for the time being. It is said, and this is the stress of Mr. Humphry's argument, that the Charity Commissioners ought not to have omitted to make a special provision for widows in this scheme. I agree. Mr. Sargant has not attempted to argue the contrary. I think it was a slip, but it is not a case in which they are entirely excluded; they are simply put in this position, that they are made members of a larger class; the funds applicable for the benefit of this larger class are very much larger than the income of Hannah Bayly's Charity; in point of fact, according to the evidence, the survivors of Hannah Bayly's pensioners at the date of the scheme have received 15*l.* a year instead of 5*l.* down to the present time, and we were told that the amount actually given to widows is certainly more than the total income of Hannah Bayly's fund. But, however that may be, and without prejudice to any application which may be made for an amendment of the scheme—an application which I may say I hope will be made and granted—without prejudice to that, and dealing with matters just as they are now, I think there is no ground for saying that this gift to charity fails. I think the decision of Neville J. was wrong, and that the Attorney-General is entitled to ask us to reverse his judgment and say that this charity has not failed, and that the money ought to be paid to the trustees of the charity under the scheme.

FARWELL L.J. I am of the same opinion. Neville J. has held that Hannah Bayly's Charity is no longer in existence. If that be so, I ask myself, How did it come to an end? and the answer suggested is, By the scheme of the Charity Commissioners. The jurisdiction given to the Charity Commissioners is given by the Act of 1860, and they have amongst other authorities the same power that the Court of Chancery had and the Chancery Division has for establishing schemes for the administration

of any charity. That administration may, under proper circumstances, be cy-près, but the jurisdiction is for the establishment, encouragement, and continuance of a charity—even going beyond the actual words of the will, if there be an impossibility of carrying out literally the trusts—and a jurisdiction to administer cy-près. In the present case there is no question of a cy-près execution. Nobody suggests that there has been a failure of poor widows in Rotherhithe, and unless and until that happy event happens there will be no case for any cy-près administration. What is said is this: the Commissioners have in fact destroyed this trust because in the scheme which they have issued dealing with the amalgamation of the several charities the objects are stated to be poor persons of good character resident in Rotherhithe, not mentioning widows in particular—not of course excluding them, but not giving them that preference which I agree with the Master of the Rolls in thinking ought to have been given. But to say that this omission has incidentally destroyed the Bayly Trust is a very strained construction of the language and one that entirely fails, because the Charity Commissioners had no jurisdiction whatever to destroy the charity. Suppose the Charity Commissioners or this Court were to declare that a particular existing charitable trust was at an end and extinct, in my opinion they would go beyond their jurisdiction in so doing. They cannot take an existing charity and destroy it; they are obliged to administer it. To say that this pardonable slip (I use the word with all respect to the draftsman) has the effect of destroying the charity appears to me extravagant. In all these cases one has to consider not so much the means to the end as the charitable end which is in view, and so long as that charitable end is well established the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided.

In my opinion it is quite impossible to say here that the widows are excluded, or even if they were in terms excluded, that that would destroy the trust: it could only give grounds for an application to set right that which in any event could only be put in per incuriam. I agree that the appeal must be allowed.

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KENNEDY L.J. I shall not differ from the conclusion at which both the Master of the Rolls and Farwell L.J. have come, though I confess I have felt doubt about this case, which is a peculiar one. It does strike one as being somewhat strange that a testatrix should leave a sum of money to Mrs. Bayly's Charity, Rotherhithe, and if inquiry is made for the locus in quo of such a charity or the persons named as the charitable trustees, no such persons can be found in Rotherhithe at all. The funds of Mrs. Bayly's Charity of course exist, metamorphosed as they have been under the scheme, so far as regards the actual character of the fund in the sense of its being a fund distributable to widows only. The administration of those funds no doubt in this case exists; there are persons who under the scheme do administer this and other moneys for charitable purposes; but the question which I have felt some doubt about is, if the continuance—that word has been used throughout—of a charity is requisite, what is the essential thing to constitute the continuance of that charity as the subject of a charitable gift in a will? and it does seem, under the circumstances I have stated, at first sight, strange that this is a perfectly good bequest to persons who are administering a fund of which they are not bound to give one penny to a widow. The terms of the will no doubt are important, because it is not a gift to "Mrs. Bayly's Charity Rotherhithe for widows," words which I should have felt it impossible to get over, when the persons who ask for it are a body created by a scheme of the Charity Commissioners, which has no special obligation to consider the claims of widows. But no case has been shewn to me in which an endowed charity has been treated as having, so to speak, lost its life by reason of the exercise of the perfectly competent authority under parliamentary sanction of the Charity Commissioners, or the equally competent authority of this Court, under which its funds have come to be applied somewhat differently to the way in which they were applied under the original foundation. This being so, I am unable to say that the contention which has found favour with Neville J. ought to prevail, and I therefore shall not differ from the Master of the Rolls and Farwell L.J. on this point. It seems to be the law, that an endowed charity, to whatever purpose its funds are devoted, if and so long as they are

devoted to some charitable purpose under some duly authorized scheme, remains still existent so as to draw to it a sum of money given by a will for, presumably, the same purpose as the original charity. Therefore, if that is right, the view which has been stated by the Master of the Rolls and Farwell L.J. ought to prevail, and I concur in it.

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Appeal allowed.

Solicitors: *Treasury Solicitor; Fairfoot, Rooke & Macdonald.*

H. C. R.

In re METROPOLITAN AMALGAMATED ESTATES, LIMITED.

FAIRWEATHER *v.* METROPOLITAN AMALGAMATED ESTATES, LIMITED.

[1912 M. 263.]

SWINFEN EADY J. 1912 *June* 25; *July* 2, 16.

YORKSHIRE INSURANCE COMPANY, LIMITED *v.* METROPOLITAN AMALGAMATED ESTATES, LIMITED.

[1912 Y. 126.]

Receiver—Appointment in Second Mortgagee's Action—First Mortgagees not Parties—Claim by First Mortgagees for Possession—Notice to Receiver and Tenants—Application to Court—Rents collected by Receiver between Notice and Application.

A company having mortgaged leasehold flats to first mortgagees subsequently issued a mortgage debenture to a debenture-holder.

On February 1, 1912, the first mortgagees appointed A. as receiver under their statutory power, but did not give immediate notice to the tenants.

On February 2 the debenture-holder (the second mortgagee) obtained the appointment of B. as receiver in a debenture-holder's action to which the first mortgagees were not parties, and immediate notice was given to the tenants.

On February 8 the first mortgagees gave B. and the tenants notice of A.'s prior appointment and claimed the rents.

On February 27 the first mortgagees applied to the Court for liberty to take possession notwithstanding B.'s appointment, and on March 1 B. was ordered to give up possession:—

Held, that notwithstanding the appointment of A. on February 1 and

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the notice of February 8 the first mortgagees were not entitled to any rents collected by B. prior to their application of February 27.

Thomas v. *Brigstocke* (1827) 4 Russ. 64, 65; *In re Hoare* [1892] 3 Ch. 94, 100; and *Preston* v. *Tunbridge Wells Opera House, Ld.* [1903] 2 Ch. 323, 325, applied.

SUMMONS.

On April 18, 1910, the Metropolitan Amalgamated Estates, Limited (hereinafter called the mortgagor company), mortgaged certain leasehold flats to the Yorkshire Insurance Company, Limited (hereinafter called the first mortgagees), to secure 14,000*l.*

On March 16, 1911, the mortgagor company issued a mortgage debenture to Fairweather (the second mortgagee) for 1000*l.* This debenture charged all the property of the mortgagor company.

On January 30, 1912, a compulsory order was made for the winding up of the mortgagor company.

On February 1, 1912, the October interest on the first mortgage being in arrear, the first mortgagees in exercise of their statutory power appointed Philips receiver under their mortgage.

On February 2, 1912, Whitehill, a tenant of one of the flats, was appointed receiver of the mortgagor company's property on the application of Fairweather, the plaintiff in a debenture-holder's action to which the first mortgagees were not parties. Whitehill gave immediate notice of his appointment to the tenants and demanded payment of the rents.

In his affidavit of February 1, 1912, in support of his application Fairweather stated that the October interest on the first mortgage was in arrear and that the first mortgagees were threatening to appoint a receiver under their mortgage. But neither he nor Whitehill knew at the date of the application that the appointment had already been made.

On February 8, 1912, the first mortgagees, who were aware of Whitehill's appointment, gave the tenants (including Whitehill) notice of Philips' appointment and instructed them to pay their rents to him, but on February 19, after some correspondence with Whitehill's solicitor, they withdrew their notice so as not to interfere with the receiver appointed by the Court. The

withdrawal was made without prejudice to their legal rights and pending an application to the Court.

On February 15, 1912, the first mortgagees issued a foreclosure summons to enforce their security. Fairweather was a defendant to this summons.

On February 27, 1912, they served a notice of motion in the debenture-holder's action asking that their receiver Philips might be at liberty to take possession of the flats notwithstanding the appointment of Whitehill as receiver.

On March 1, 1912, Whitehill was ordered to give up possession of the flats to Philips.

On March 22, 1912, a foreclosure order nisi was made.

In the meantime, namely, between February 13 and February 26, both inclusive, Whitehill had collected 134*l.* rents from the tenants.

On May 13, 1912, the first mortgagees issued this summons in both actions asking that Whitehill should hand over the 134*l.* to Philips after deducting any outgoings or payments properly paid in respect of the flats.

Maugham, for the first mortgagees. The rents in Whitehill's hands were all collected after our notice of February 8, 1912. They therefore belong to us. The subsequent withdrawal of our notice without prejudice to our legal rights is immaterial. We could not properly interfere with an officer of the Court, but on the other hand after our notice it was the duty of that officer to collect the rents for the parties really entitled.

A. F. Topham, for Fairweather, the second mortgagee, and his assignees. The notice of February 8 was abortive as against the Court receiver and was properly withdrawn. Fairweather was properly in possession by Whitehill and could not be ousted without an application to the Court. This application was not made till February 27, and the 134*l.* rents previously collected belong to us: *Thomas* v. *Brigstocke* (1); *In re Hoare* (2); *Preston* v. *Tunbridge Wells Opera House, Ld.* (3); Kerr on Receivers, 5th ed. pp. 176, 177.

(1) 4 Russ. 64, 65. (2) [1892] 3 Ch. 94, 100, 103.
(3) [1903] 2 Ch. 323, 325.

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P. F. Stokes, for Whitehill, the Court receiver. Whitehill is neutral, but the registrar gave him leave to be separately represented.

Maugham in reply. In *Thomas* v. *Brigstocke* (1) the receiver was appointed in May, 1818, in an action to administer the trusts of the mortgagor's will. The mortgagee whose title was then in dispute was not a party, and though he gave notice to the tenants in June, 1818, he took no effective steps to obtain possession till nine years later. The intermediate rents had been paid into Court by the receiver. In the present case we have applied promptly, and the money is still in Whitehill's hands. It would be a great hardship if first mortgagees were to lose their rights under such circumstances. It is fairly clear that Fairweather obtained Whitehill's appointment because he knew we were just about to appoint a receiver. We had, in fact, already appointed Philips. We had not given notice to the tenants as we had not then obtained a list of their names, but in the circumstances it would be inequitable to deprive us of our undoubted legal priority. It is not a case of lying by as in *Thomas* v. *Brigstocke*. (1) It is a case of our receiver being temporarily unable to perform his duties owing to the technical difficulty of interfering with the Court receiver, who had full notice of our rights. If Whitehill had been appointed "without prejudice to the rights of prior incumbrancers" it is doubtful if this difficulty would have arisen. (2)

In *In re Hoare* (3) the mortgagee had made no attempt to obtain possession before the interest was collected. On June 30, 1886, a mortgagor transferred certain shares by way of mortgage. The mortgagee took no steps to be registered as transferee. The mortgagor died on May 10, 1889, and on June 7, 1889, a receiver was appointed in a creditors' action for the administration of his estate. On February 3, 1892, the mortgagee valued his security and proved for the balance of his debt. On March 11, 1892, he was registered as transferee, and on March 23 he applied for back dividends in the receiver's hands. On those facts he was clearly not entitled.

(1) 4 Russ. 64, 65.
(2) See *Underhay v. Read* (1887) 20 Q. B. D. 209, 219.
(3) [1892] 3 Ch. 94, 100, 103.

In *Preston* v. *Tunbridge Wells Opera House, Ld.* (1) the rent was paid after the first mortgagee's notice of motion to discharge the second mortgagees' receiver, so that the present question did not really arise. It was merely held that the first mortgagee was entitled to this rent, although received before the actual order of discharge.

[SWINFEN EADY J. There is some confusion in the dates in that case. The first mortgagee gave notice to the tenants on January 7, 1903, before the second mortgagees obtained their receiver. How could the second mortgagees oust the first mortgagee?]

It is not very intelligible, but it seems to have been assumed that the receiver was properly in possession, and the case was decided on that footing. (2)

SWINFEN EADY J. (after stating the facts). It is well settled that until a mortgagee takes possession by himself or a receiver the mortgagor is in undisputed possession of the property and the rents. If a puisne incumbrancer enters into possession or receipt of the rents, the mortgagor's possession is displaced and the puisne incumbrancer can receive the rents without accounting to any prior incumbrancer until that prior incumbrancer intervenes. When he intervenes he displaces the puisne incumbrancer, but until that intervention the puisne incumbrancer is entitled to remain in possession of the rents. This law is clear and undisputed.

In the present case the second incumbrancer Fairweather obtained the appointment of a receiver in the debenture-holder's action. The first mortgagees were not parties to the action, and the receiver Whitehill was not appointed on their behalf. He was merely appointed in the debenture-holder's action. It is suggested that there is some doubt as to the effect of an order appointing a receiver "without prejudice to the rights of prior incumbrancers," but it is unnecessary to consider that point as the present order was not so expressed.

(1) [1903] 2 Ch. 323, 325.

(2) It appears from the report in 72 L. J. (Ch.) 774 that there was a previous order of December 19, 1902, which probably prevented the notice of January 7, 1903, being effective. The motion of January 17, 1903, was to discharge the orders of December 19, 1902, and January 14, 1903. The existing receiver was appointed on the latter date and not on January 17.

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It is clear, however, that, notwithstanding the order appointing Whitehill, the first mortgagees were entitled to come in and displace him. It is true they could not do this vi et armis or without coming to the Court. But they had only to signify their desire of obtaining possession by an application to the Court, and this application they could make by serving a notice of motion on which an order for possession would be made. In the present case the notice of motion was served on February 27 and the order for possession was made on March 1, and in my opinion the first mortgagees are entitled to the rents as from February 27.

The point is really covered by *Thomas* v. *Brigstocke* (1) and *Preston* v. *Tunbridge Wells Opera House, Ld.* (2) In the latter case Farwell J., referring to the judgment in *Thomas* v. *Brigstocke* (1), says: "In that case the Master of the Rolls (Sir John Leach) in giving judgment says that a mortgagee may be considered to be in possession 'from the time of the discharge of the receiver, or perhaps from the time when his application was first made for that discharge.' In my opinion the latter date mentioned by the Master of the Rolls is the correct one. It is due to the exigencies of the business of the Courts that an application cannot be heard the moment it is made, and I think the first mortgagee should not be made to suffer from the necessary delay arising from this cause."

It follows that from the earliest date that the first mortgagees effectively signified their desire of obtaining possession, namely, by serving their notice of motion, they were entitled to the rents. But it is clear they could not obtain possession without coming to the Court. It was pointed out in *Thomas* v. *Brigstocke* (1) that "A mortgagee is entitled only to such rents as accrue due when he is in possession of the mortgaged premises. His notice to the tenants could not devest the possession of the receiver, which was in truth the possession of those who claimed under the will of the mortgagor. For the purpose of devesting the possession of the receiver, an application to the Court was necessary."

In the present case Whitehill was appointed by the Court on

(1) 4 Russ. 64, 65. (2) [1903] 2 Ch. 323, 325.

February 2 and gave immediate notice to the tenants. The first mortgagees could not divest his possession by their notice of February 8 without coming to the Court. Their notice was in fact withdrawn on February 19 without prejudice to their rights and pending the application which they made on February 27, and in my opinion February 27 is the date on which they first became entitled to the rents.

It was contended that this view tended to hardship on first mortgagees, as it would enable second mortgagees by obtaining a receiver just before quarter day to intercept the rents of less nimble first mortgagees. But any mortgagee is entitled to intervene and take the rents unless a prior mortgagee has already done so. If the prior mortgagee is apprehensive of his position he should at once take proper steps to obtain possession for himself.

It was also suggested that the fact that the second mortgagee knew that the first mortgagees contemplated taking possession raised some sort of equity in favour of the latter ; but unless and until they changed their attitude from contemplation to action the second mortgagee was entitled to act independently. Whitehill was properly appointed in the second mortgagee's action and ought not to account to the first mortgagees for rents received before February 27. That is the law and it is no hardship on the first mortgagees, who made no application to the Court before that date.

In *In re Hoare* (1) Stirling J. said: " If the estate were not in the possession of the Court, one incumbrancer might claim his interest and insist on being regularly paid. Another might suffer his to run in arrear. The estate would be discharged of the one, and remain burdened with the other. Why should it be otherwise when the estate is in the possession of the Court ? "

I therefore hold that the first mortgagees are entitled to the rents as from February 27 and not before.

Solicitors: *Gray & Dodsworth ; M. A. Jacobs ; C. S. Giddins.*

(1) [1892] 3 Ch. 94, 100.

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[1911 S. 4204.]

Landlord and Tenant—Lease—Power to determine on Notice—Covenants—Assignments—Assignee's Covenant to indemnify Assignor—Notice to determine by Equitable Owner of Lease—Outstanding Legal Estate—Breaches of Covenant—Conditions Precedent — Invalid Notice—Estoppel — Third Party Notice to indemnify—Assignment as "Beneficial Owner"—Implied Covenants for Title—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 7, *sub-s.* 1 (A)—*Rectification of Assignment.*

Where a lease contains the usual power for the lessee to determine it at the expiration of the first seven or fourteen years of the term on giving a six months' previous notice in writing, such notice in order to be valid must be given by or on behalf of the person in whom the lease is legally vested at the date of the notice.

Dictum of Channell J. in *Seaward* v. *Drew* (1898) 67 L. J. (Q.B.) 322, 324, that such a notice, if given by the person who has the whole equitable interest in the lease, would be valid, dissented from.

Jones v. *Phipps* (1868) L. R. 3 Q. B. 567, explained.

A lease for a term reserved rent payable quarterly with a stipulation that the last payment of rent should be made in advance one month before the determination of the tenancy. The lease contained a proviso that the lessee might determine the lease at the end of the first seven or fourteen years on giving six months' previous notice in writing, and that if the lessee should give the notice, and should pay all the rent and perform all the covenants "up to such determination," then the lease should cease and be void. An assignee of the lease gave notice to determine the lease at the end of the first seven years:—

Held, following *Grey* v. *Friar* (1854) 4 H. L. C. 565, that the conditions of the proviso were conditions precedent to the determination of the lease, and that their non-observance invalidated the notice.

Dictum of Channell J. in *Seaward* v. *Drew*, supra, on a somewhat similar proviso, to the effect that, if such a notice is otherwise valid, the lessee's covenants may be performed after the determination of the term, dissented from.

A contract for the sale of a lease contained a condition that the vendor should not be required to get in an outstanding bare legal estate nor to obtain the concurrence in the purchaser's conveyance of the person in whom such estate was vested. The conveyance, which was in common form, did not refer to the condition, and the vendor conveyed "as beneficial owner," thereby incorporating the covenants for title in s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881. The purchaser some years afterwards under a power in the lease gave the lessors notice to determine it at the expiration of the first seven years of the

term, but the notice was held to be invalid because it was not given by the person who had the legal estate in the term. The purchaser then sued the vendor for damages for breach of his covenants for title :—

Held, that the vendor was entitled to have the conveyance rectified by inserting therein a proviso excluding any liability on his part by reason of the legal estate in the term being outstanding.

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WITNESS ACTION.

This was an action brought to obtain, amongst other things, a declaration that a notice to determine a lease was ineffectual and that the lease was still subsisting in these circumstances.

By an indenture of underlease (hereafter called a lease) dated September 2, 1897, and made between the plaintiff John Stait and one James Stait (thereinafter called the lessors) of the one part, and R. Fenner, a physician, of the other part, the messuage No. 21, New Cavendish Street, in the county of London, with its appurtenances, was demised by the lessors to the lessee for the term of twenty-one years from September 29, 1897, determinable as thereinafter mentioned, at the yearly rent of 250*l.* payable quarterly on the usual quarter days, the last payment of the rent to be made in advance one calendar month before the determination of the tenancy. The lease contained usual covenants by the lessee to keep the premises in substantial repair, and in particular to paint in the year 1901 and thereafter twice in every seven years all the outside work usually painted, and to paint in the year 1901 and thereafter once in every seven years all the inside work usually painted, "and the said premises so repaired and kept in good repair at the end or sooner determination of the said term to deliver up to the lessors"; and that the lessors might four times in every year enter upon the premises and examine the state of repair, and that the lessee would repair all defects and want of repair within three calendar months after notice in writing; and that the lessee would not assign, underlet, or part with the possession of the premises or any part thereof without the previous licence in writing of the lessors. And it was thereby provided "that if the lessee shall be desirous of determining this present lease at the expiration of the first seven or fourteen years hereby granted, and of such his desire shall give six calendar months' previous notice in writing to the lessors or leave the same at or send the same by registered letter to

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their usual or last known places of abode in England, and shall pay all the rent and perform and observe all the covenants hereinbefore reserved and contained and on the part of the lessee to be paid performed and observed up to such determination then and in any such case and immediately after the expiration of the said term of seven or fourteen years as the case may be this present lease and everything herein contained shall cease and be void."

In 1899 Dr. Fenner, with the written licence of the lessors, by deed assigned to a Miss Court the premises demised by the lease of September 2, 1897, for the residue of the term thereby granted, and she in 1902 with the like licence by deed assigned the same premises for the residue of the same term to a Mrs. Irvine, who paid the rent reserved by the lease direct to the lessors until as after stated.

Early in June, 1905, Mrs. Irvine, being in arrear with her rent, removed her furniture and vacated the premises, leaving no address. The lessors, being informed of this fact, at once communicated with Dr. Fenner and stated that they should look to him for the rent, and suggested that he should endeavour to get a reassignment of the lease from Mrs. Irvine. Dr. Fenner through his solicitors succeeded in tracing Mrs. Irvine, and on June 30, 1905, she handed over to him the lease of 1897 and the assignments of 1899 and 1902, and signed an undertaking to surrender or assign the lease to him, if required, on the understanding that she should not be called upon for any rent or dilapidations. Dr. Fenner then took possession of the premises and laid out a considerable sum in repairs, and on September 29, 1906, with the written licence of the lessors, by deed assigned the premises to one Macnab for the residue of the term granted by the lease of 1897. This assignment was in common form and recited only the lease of 1897, and Macnab covenanted in the usual way to pay the rent and perform the covenants of the lease and to indemnify Dr. Fenner against all breaches of the covenants, and Macnab thenceforth paid the rent direct to the lessors, who gave him receipts for the same. At the same time Macnab, with the written licence of the lessors, sub-let part of the premises to Dr. Fenner on a yearly tenancy.

On March 8, 1911, Macnab, who had vacated the premises, gave the lessors notice in writing to determine the lease of 1897, as follows:—

"I hereby give you notice that in pursuance of the power given to me by the indenture of lease dated the 2nd day of September, 1897, and made between you of the one part and Dr. Robert Fenner of the other part, which indenture of lease was assigned to me by an indenture dated the 29th day of September, 1906, and made between the said Dr. Robert Fenner of the one part and myself of the other part, it is my intention to determine the lease thereby made on the 29th day of September next, and I shall therefore quit and deliver up possession to you of the messuage and premises situate at 21 New Cavendish Street comprised in the said indenture of lease on the 29th day of September next."

The lessors by their solicitors formally acknowledged the receipt of this notice.

On September 16, 1911, the lessors' solicitors informed Dr. Fenner that the notice was ineffectual to terminate the lease because it was not given by the person in whom the leasehold term was vested, and they declined to accept the key of the premises. Correspondence ensued, and eventually the then lessors (who were John Stait and the executors of James Stait, who had died in 1905) commenced this action on December 27, 1911, against Dr. Fenner. The plaintiffs by their statement of claim alleged that Dr. Fenner in breach of his covenants had not kept the premises in good repair up to September 29, 1911, and had not paid the Michaelmas rent in advance one calendar month before that date, and that Macnab was not the lessee of the premises, and they claimed (inter alia) payment of a sum of 64*l.*, being the amount of one quarter's rent to Christmas, 1911, and an insurance premium, and a declaration that the term created by the lease of September 2, 1897, was still subsisting.

By his defence Dr. Fenner denied the allegations of the plaintiffs and insisted that the lease was validly determined by the notice. He also pleaded that, by reason of the grant of the licences of September 29, 1906, and the subsequent receipt of rent from Macnab, the plaintiffs were estopped from denying that

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Macnab was at the date of the notice the lessee of the premises and the person entitled to give the notice. Alternatively, he pleaded that the result of the undertaking by Mrs. Irvine and his retaking possession of the premises with her consent was to vest in him the equitable interest in the whole unexpired residue of the term granted by the lease free from any claims by her, and that such equitable interest was vested in Macnab at the date when he gave his notice, and that by reason of the aforesaid circumstances Macnab had authority as her agent to give the notice.

Dr. Fenner also served Macnab with a third party notice claiming to be indemnified by him against the rent and covenants of the lease and the costs of the action.

Mrs. Irvine's undertaking was not forthcoming, but the solicitor who acted for Dr. Fenner at the time deposed to having prepared it for execution by her, and the case proceeded on the footing that she had signed it.

Jenkins, K.C., and *D. M. Hogg*, for the plaintiffs. The lease is still subsisting. The notice given by Macnab to determine it was bad for two reasons. It was given by the wrong person. The only person who can give the notice is the person who has the legal estate and could surrender the lease. And the covenants, the performance of which was a condition precedent to the right to determine the lease, had not been performed. There had been breaches of the covenant to repair, and the last quarter's rent was not paid in advance according to the proviso. The defendant may rely upon *Jones* v. *Phipps* (1), but that case was decided on the ground of agency; the trustees had allowed their cestui que trust to have the absolute control of the property for years, and it was held that they had made him their general agent, and it was within his powers as agent to give a tenant notice to quit. In this case the only person who could surrender or give notice to quit was Mrs. Irvine, and Macnab was not in any sense her agent. *Seaward* v. *Drew* (2) decided that notice to determine could only be given by the person in whom a mortgaged term was legally vested. Channell J., however, expressed an opinion that if the whole equitable interest had been in the defendant,

(1) L. R. 3 Q. B. 567. (2) 67 L. J. (Q.B.) 322.

Jones v. *Phipps* (1) might have applied and the notice might have been good, but that was a mere dictum and founded on a misapprehension of *Jones* v. *Phipps*. (1) In the next place, the performance of covenants is a condition precedent to the exercise of a power to determine—*Porter* v. *Shephard* (2); *Grey* v. *Friar* (3)—or to renew the lease—*Finch* v. *Underwood* (4)—and in this case they were not performed.

Peterson, K.C., and *H. E. Wright*, for Dr. Fenner, did not argue, the onus being on Macnab.

Butcher, K.C., and *F. McMullan*, for Macnab. There are two answers to the contention that Macnab was not the proper person to give the notice. In the first place, the circumstances under which Mrs. Irvine handed over the lease and two assignments and gave her undertaking operated to give Dr. Fenner the entire equitable interest in the term with a right to call for the legal estate. She was a bare trustee of the legal estate for him, and a person who is not de facto the legal owner can give the notice if he has the authority of the person who has the legal interest: *Jones* v. *Phipps*. (1) Dr. Fenner had the whole equitable interest and implied authority as Mrs. Irvine's agent to give the notice, and that interest and that right he passed on to Macnab. In *Seaward* v. *Drew* (5) the notice was given by an equitable mortgagee who had not the whole equitable interest, which is not this case, and Channell J. in a considered judgment does say that a notice given by a person who has the entire equitable interest would be good and that *Jones* v. *Phipps* (1) would apply. Secondly, the plaintiffs are estopped from asserting that Macnab was not the proper person to give the notice. They had granted a licence to Miss Court to assign to Mrs. Irvine. They knew that Mrs. Irvine disappeared in June, 1905, and suggested to Dr. Fenner that he should obtain a reassignment from her, and must be taken to have known that no assignment of the lease was ever executed by her because no application on her behalf for a licence to assign was ever made, yet they accepted Dr. Fenner as the tenant and in 1906 granted

(1) L. R. 3 Q. B. 567.
(2) (1796) 6 T. R. 665.
(3) 4 H. L. C. 565.
(4) (1876) 2 Ch. D. 310.
(5) 67 L. J. (Q.B.) 322, 324.

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licences to assign to him and to Macnab and accepted rent from them. Dr. Fenner did not mislead them in any way, and there is nothing to suggest that they supposed that Mrs. Irvine had assigned the lease to him. Therefore they are estopped, and cannot now turn round and assert that Macnab was not their tenant and not the proper person to give the notice. Then it is said that the performance of the covenants was a condition precedent to the determination of the lease, but the language of the proviso is different to that in *Grey* v. *Friar* (1) and *Porter* v. *Shephard.* (2) In one the words were "having been duly performed" and in the other "from and after." Here the words are "if the lessee shall perform the covenants up to such determination," that is, up to the end of the notice to determine, and come within the ruling of Channell J. in *Seaward* v. *Drew.* (3) But if the performance of the covenants was a condition precedent, they were performed. Payment of the last quarter's rent in advance does not necessarily mean punctual payment: *Starkey* v. *Barton.* (4) Here it was in fact paid the day after September 29, 1911, and was accepted, and the covenant was performed; and on our evidence the premises at that time were in good tenantable repair, which was all that the plaintiffs were entitled to, and their schedule of repairs is excessive and unreasonable: *Crawford* v. *Newton* (5); *Proudfoot* v. *Hart.* (6) Lastly, the objection that the covenants had been broken was raised for the first time by the statement of claim. The plaintiffs inspected the premises before the expiration of the notice, and if there was any want of repair they ought then to have drawn our attention to it and it would have been at once put right. But they kept silence and only take the objection when it is too late for us to do anything, and must be taken to have waived it by accepting the rent after the expiration of the notice.

NEVILLE J., after stating the facts, continued: For the purposes of my judgment I shall assume that Mrs. Irvine's undertaking was an undertaking to assign or surrender her lease which

(1) 4 H. L. C. 565.
(2) 6 T. R. 665.
(3) 67 L. J. (Q.B.) 322, 324.
(4) [1909] 1 Ch. 284.
(5) (1887) 36 W. R. 54.
(6) (1890) 25 Q. B. D. 42, 52.

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was enforceable. That being so, I have to consider whether Dr. Fenner, being the original lessee and having in his hands the lease and the two assignments of the lease which vested the term in Mrs. Irvine, and being entitled to treat her as a trustee for him, was within the meaning of the lease the person entitled to give notice to determine the lease at the end of the first seven or fourteen years by a six months' notice. On that point I have no direct authority, but there is a dictum by Channell J. in the case of *Seaward* v. *Drew* (1), in which he had to determine whether a notice given by an equitable mortgagee of the term in a lease with a somewhat similar proviso was a good notice. He held that it was not, but he does say that he is inclined to think that, if a person purporting to exercise the right to give notice could have made out that he had the entire interest in equity, then the case of *Jones* v. *Phipps* (2) would have applied and the notice might have been good. Now I need not say that Channell J. is at least as likely to be right upon such a question as I am, but with deference I respectfully differ, and it is not a dictum that I can act upon. I must therefore exercise my own judgment in the matter, and in my opinion *Jones* v. *Phipps* (2) does not apply. In that case certain trustees of property, including a farm, had given one of their cestuis que trust complete authority to manage the farm, and in the course of his management he had given in his own name a notice to determine a tenancy, and the question was whether that notice was authorized by the terms of his agency so as to bind the trustees, and it was held that it was and that there was no obligation on him, in the exercise of his authority, to use the name of the trustees at all. Having regard to the extent of his authority he was entitled to give notice in his own name, and that bound the trustees. But it is quite a new doctrine to me, even in the case of a bare trustee, that the cestui que trust is the agent of the trustee. He has rights, no doubt, against the trustee, which are readily enforceable, and here Dr. Fenner, on the assumption upon which I am proceeding, could have compelled Mrs. Irvine, his trustee of the term, to convey it to him or as he directed, but in my opinion there was no relation of agency existing between them at all. As a matter

(1) 67 L. J. (Q.B.) 322, 324. (2) L. R. 3 Q. B. 567.

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of fact, no assignment from Mrs. Irvine was ever obtained, and beyond question the term is now legally vested in her. After she vacated the premises Dr. Fenner entered into possession of them, and subsequently assigned them to Macnab, and it is said that the subsequent receipt of the rent from Dr. Fenner, and afterwards from Macnab, estops the lessors, the plaintiffs, from saying that the term was not vested, and properly vested, first in Dr. Fenner, and then in Macnab. I am quite unable to follow that suggestion. In my opinion the lessors had neither notice nor knowledge that the term was not vested in Dr. Fenner. Further than that, they had throughout the whole time the right to insist upon payment by Dr. Fenner of the rent for the premises, and I am unable to understand how the receipt of rent from the original lessee can estop the lessors from saying that the lease was not legally vested in Dr. Fenner. Then with regard to Macnab, the receipt of rent from him would have prevented the lessors from afterwards objecting that the assignment to him was made without the necessary licence having been obtained, but in my opinion the intention was to accept Dr. Fenner as the tenant. He was advised to get a reassignment from Mrs. Irvine, and it was quite beyond the idea of either party that any further recognition of Dr. Fenner was required. He was the original lessee, and the lessors advised him to get back the lease, and I think that they were quite justified in supposing that he had got the lease revested in him by assignment. In my opinion it was no part of their duty at that or at any other time (until the time I will deal with presently) to ascertain what the true title of Dr. Fenner was, and that the argument with regard to estoppel is only founded, first of all, on the allocation to the lessors of the duty which was incumbent on the lessees, and then on the suggestion that because they did not perform the lessees' duty they are estopped from asserting the lessors' title. The question, therefore, as to whether this notice was effectual I answer in the negative. In my opinion, the legal estate in the term being outstanding, it was not competent for the lessee or any assignee of the lessee who had not the legal estate vested in him to give a notice. I think that under the terms of the lease that must be so, and, as I have

already said, I do not think that the cestui que trust here can be said to be the agent of the trustee, as in *Jones* v. *Phipps* (1), where the cestui que trust was the agent of the trustees under a special agreement. I think therefore that, without estoppel, the notice was bad in the present case, and I have already indicated that the facts do not shew any estoppel. I also think the mere fact that no express licence was demanded for an assignment from Mrs. Irvine to Dr. Fenner is perfectly intelligible under the circumstances, and certainly not such an omission as to fix the lessors with notice that Dr. Fenner was not the legal owner of the term.

The next question is one of considerable importance, and that is whether the conditions in the proviso that the lessee shall pay the rent and perform the covenants of the lease "up to such determination"—that is, the determination which is to result from the serving of the six months' notice—are conditions precedent to be performed before the expiration of the term, or whether they are conditions that may be performed at any time afterwards. In my opinion the case of *Grey* v. *Friar* (2) is an authority to the effect that these conditions are conditions precedent. It is quite true that the words used in the present case are not precisely the same as those in *Grey* v. *Friar* (2), and it is also true that the proviso there contained a clause which would have made the interpretation of the lease intelligible if the conditions had been conditions subsequent. In *Grey* v. *Friar* (2) there was an express proviso that the termination of the term should not interfere with the rights of action between the parties for what had previously occurred. But it seems to me that, in the absence of a provision of that character,—and there is none such in the present case—the determination of the term at the expiration of the notice absolutely puts an end to all rights of action in respect of anything contained in the lease on the part of the lessor or on the part of the lessee. But if one were to hold these conditions were not conditions precedent, the result would be that the lease would be put an end to, and any right of action on the part of the lessor in respect of the breach of the covenants existing at the date of the termination of the lease would be altogether gone and

(1) L. R. 3 Q. B. 567. (2) 4 H. L. C. 565.

NEVILLE J. he would be left without any remedy at all. The proviso in the present case is free from any ambiguity, and I read it to mean that if the lessee shall give the notice and "shall pay all the rent and perform all the covenants on the part of the lessee up to such determination"—that means the date of the expiration of the term at the end of the seven or fourteen years when the lease is to be determined by notice—"then in such case and immediately after the expiration of the said term of seven or fourteen years as the case may be this present lease and everything herein contained shall cease and be void." How can it be said that the meaning of that is that the right of action of the lessor in respect of a breach of covenant shall survive notwithstanding the termination of the lease at the expiration of the seven or fourteen years? It seems to me to be directly contradictory to the express terms of the proviso. I think that the performance of the covenants "up to such determination" is perfectly intelligible and means this, that if all rent has been paid and all acts and covenants have been performed up to the date of the determination, then the term shall determine and the lease shall be utterly void; but if those conditions have not been fulfilled, then the term shall not cease and the lease shall not be void. I confess myself quite unable to put any other interpretation upon this proviso, but before I pass from it I should like to refer to another dictum of Channell J. in the case of *Seaward* v. *Drew* (1), which is to the effect that the words of the proviso in that case—the words there of course not being quite the same as the words here, the words there being "having first paid the rent and performing the covenants"—are properly construed by saying that the covenants may be performed after the time fixed by the notice for the expiration of the term. I respectfully differ from that view. It appears to me, in the first place, that the introduction of refined distinctions in the construction of covenants and provisoes of general use in leases is to be regretted, leading as it must to uncertainty in the rights of the parties to them. To hold in a case like the present that the condition would be fulfilled if the covenants were performed after the time fixed for the expiration of the lease would leave

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(1) 67 L. J. (Q.B.) 322, 324.

the question of the expiration of the lease in suspense for an indefinite period. Whether the lease is to determine at the time of the fulfilment of the covenants, or whether there is to be a relation back and it is to be determined at the end of the seven years or the fourteen years, one really does not know. But in either case nobody may be able to say after the expiration of the seven or fourteen years, as the case may be, whether the lease is in existence or whether it is not, and it appears to me it must have been intended, in construing a covenant of this kind, that the question whether the lease does or does not exist after the expiration of the seven or fourteen years should be capable of being decided there and then, and not left to future contingency, leaving both the lessor and the lessee in uncertainty as to whether they are bound by the lease or whether they are not. I think, therefore, that the conditions of this proviso were conditions precedent. If that be so, then one of the conditions was not performed because, if the lessee had to pay all rent before the expiration of the notice, that is before the expiration of the seven years, he did not do it. He paid the day after the expiration of the seven years, and the last quarter's rent had become payable one month previous to the determination of the term. That of course, if the construction that I have put upon the clause is the correct one, was necessary, or else the right to the rent would be gone altogether, because the lease and everything contained therein would have been absolutely void and no right of action would have been retained on account of the rent. The construction that I have applied seems to me to make it all perfectly intelligible, because the rent then becomes payable a month before the determination of the term, and if it is not paid before the determination of the term then the condition of this clause has not been fulfilled and the notice is invalid.

There is another question that I have to consider, and it is one of some difficulty, and that is whether the covenant to repair had been performed on September 29, 1911. [His Lordship then considered the evidence on this point, and continued :] I do not think that the covenant to repair was fulfilled; and in my opinion in the present case the burden of

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shewing that it has been fulfilled lies upon the lessee, and not upon the lessors to shew that the covenant has been broken.

There is one other point I ought to mention, because it has been strongly urged. It is said that in some way or other there has been a waiver on the part of the lessors to insist upon the invalidity of the notice—at all events upon any ground other than that of the want of title on the part of the person to give the notice. Having paid the greatest attention to the arguments, I fail to see how there can have been a waiver. Waiver depends upon a course of action inconsistent with the right asserted. The receipt of the rent was the receipt of the rent by persons who are insisting that the term is still continuing, and how that can be a waiver of the right to say it is continuing I do not understand. I think therefore that the plaintiffs succeed in shewing that the term is still subsisting, and that they are entitled to a declaration to that effect and to the costs of the action.

THIRD PARTY NOTICE.

The questions pending between the defendant Fenner and Macnab under the third party notice were then proceeded with.

By his third party notice the defendant stated that the assignment of September 29, 1906, was made in pursuance of a contract in writing dated August 22, 1906, and made between the defendant (as vendor) and Macnab (as purchaser), which provided (clause 6) that the purchaser should not require the concurrence of Miss Court or of Mrs. Irvine or any other person except the vendor in the conveyance to him, nor should the vendor be required to get in any estate which might be outstanding in Miss Court or Mrs. Irvine or their representatives respectively. The defendant then set out Macnab's covenant (which was in common form) to indemnify him against the rent and covenants of the lease, and alleged that all the claims against him by the plaintiffs fell within the scope of that covenant, and claimed that Macnab should indemnify him against any sums and costs he might be ordered to pay the plaintiffs and against his own costs of the action as between solicitor and client.

By his defence to the third party notice Macnab pleaded (as

the fact was) that by the deed of September 29, 1906, the defendant conveyed to him "as beneficial owner," and thereby impliedly covenanted with him in manner set forth in s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881, and he alleged that the defendant had broken this implied covenant because he had no title to convey the premises in manner expressed in that deed. He admitted his liability, if any, under his covenant to indemnify the defendant against the claims of the plaintiffs, but he counter-claimed that the defendant by reason of his implied covenants for title was bound to indemnify him against any liability or loss in respect of the other claims made by the plaintiffs.

The defendant in reply to Macnab's counter-claim alleged that, so far as he had by the deed of September 29, 1906, impliedly covenanted that he had a title to and right to convey the legal estate in the premises thereby conveyed, that deed failed by reason of the mutual mistake of Macnab himself to give effect to the contract of August 22, 1906, and he claimed to have the deed of September 29, 1906, rectified by inserting therein a proviso "that the covenants of the vendor which are implied by reason of his being expressed to convey as beneficial owner shall not be deemed to imply that he has power to assign to the purchaser the legal estate in the said term of twenty-one years from the 29th of September, 1897, or to render the vendor liable in damages to the purchaser by reason of the fact that the said legal estate in the said term is not effectually assigned by these presents." Macnab denied that there had been any mistake, and insisted that the deed of September 29, 1906, in all respects carried into effect the contract of August 22, 1906.

It appeared that at the time of completing his purchase Macnab required and obtained from Dr. Fenner a letter agreeing to indemnify him against any claims that might be made against him for recovery of the premises by Mrs. Irvine or by any person deriving title through her.

Peterson, K.C., and *H. E. Wright*, for Dr. Fenner. The defendant is entitled to be indemnified by Macnab against the 64*l.* and the plaintiffs' costs of the action and his own costs of the action as between solicitor and client. If, however, Macnab

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is entitled to damages under Fenner's absolute covenants for title, then Fenner is entitled to have his covenants rectified in accordance with the contract of August, 1906. The implied covenants in s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881, under which Fenner is liable are the covenant for further assurance and the covenant of indemnity against all estates, incumbrances, claims and demands, &c. The contract expressly refers to the outstanding estate in Mrs. Irvine, and the parties contemplated that Macnab was to get only the equitable interest in the term. Fenner's letter of indemnity shews the intention of the parties. There has been a mistake, and the conveyance ought to be rectified and the absolute covenants qualified by inserting the suggested proviso: *May* v. *Platt.* (1)

Butcher, K.C., and *F. McMullan*, for Macnab. The conveyance is in accordance with the contract and there is no ground for rectification. There has been no mutual mistake. Clause 6 of the contract was only a condition as to a defect in the title and not as to the form of the conveyance. It relieved the vendor from the necessity and expense of getting in the outstanding bare legal estate, but that is a totally different thing from saying that the purchaser is not entitled to damages for breach of the absolute covenants for title implied by the words "as beneficial owner," and the defect in title is not excluded from the operation of those covenants although the purchaser knew it: *Page* v. *Midland Ry. Co.* (2); *Great Western Ry. Co.* v. *Fisher.* (3) The defendant is in the position of a vendor claiming rectification with a variation, and that he is not entitled to, nor is he entitled to refer to the letter of indemnity: *May* v. *Platt.* (1)

Neville J. I think that the assignment of September, 1906, must be rectified so as to be in accordance with the real meaning of the contract which was entered into for the sale of the remainder of the term of the lease in question. The point arises under clause 6 of the contract, which provides that the concurrence of one or other of those to whom the term had been assigned should not be required by the purchaser, and it

(1) [1900] 1 Ch. 616, 621. (2) [1894] 1 Ch. 11, 20, 21.
(3) [1905] 1 Ch. 316, 322.

goes on "nor shall the vendor be required to get in any estate which may be outstanding in the said Irvine or her representatives." That was followed by a conveyance which contains an absolute assignment by the assignor "as beneficial owner"; and if that was the intention of the parties, the result was totally inconsistent with the contract that they had entered into, because those words imply, amongst other things, covenants for further assurance and indemnity, and the very moment the assignment was executed the right which had been precluded by the sixth clause of the contract would again revive, and be enforceable by the assignee. It seems to me that shews quite clearly that the introduction of the words "beneficial owner" without qualification was not in accordance with the agreement which the parties had entered into. Therefore I have to consider what limitation to that covenant has to be made. I think the proper modification to be made is to exclude altogether the matter which was the subject of clause 6 of the contract, and I think that the words which are suggested in the pleadings are the right words to insert. And in my opinion that view is confirmed by the contemporaneous letter of indemnity which was given by the assignor. I think I am entitled to look at that. It was part of the transaction and bears even date with the assignment itself, and consists of an undertaking by the assignor to indemnify the assignee in respect of any claims to be made by this very person, Mrs. Irvine, in whom the legal estate was outstanding. It seems to me that this makes the matter plain, because the extent of the liability to the assignee which the assignor was ready to undertake, in respect of this technical defect by reason of the legal estate being outstanding, is defined by the letter which was executed at the same time as the conveyance. I think, therefore, that the assignment must be rectified in the way I have suggested.

Peterson, K.C. I ask on behalf of Dr. Fenner for a declaration that he is entitled to be indemnified against the claims which have been decided in favour of the plaintiffs in the original action, that is to say, the payment of the 64*l.*, the costs of that action that he has to pay the plaintiffs' solicitors, and our own

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costs as between solicitor and client; and there will be an order for rectification of Dr. Fenner's assignment, with costs.

NEVILLE J. Yes.

Solicitors for plaintiffs: *Cooper & Bake.*
Solicitors for Dr. Fenner: *Gedge, Fiske & Gedge.*
Solicitor for Macnab: *G. E. Hodgkinson.*

H. L. F.

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In re HURST & MIDDLETON, LIMITED. MIDDLETON *v.* THE COMPANY.

[1910 H. 485.]

Solicitor—Unqualified Person—Money in Possession of Unqualified Person acting as Solicitor—Motion for Payment into Court—Summary Jurisdiction—Estoppel.

In a debenture-holder's action against the company the property comprised in the debentures was sold by the plaintiff and receiver under an order of the Court which directed that the purchase-money should be lodged in Court. The purchase-money was in fact received by E., the solicitor on the record acting for the plaintiff. It was not paid into Court, but found its way into the hands of one J., an unqualified person, who paid it into his own banking account. J. was associated in business with E., who paid him 1*l.* a week for the use of his offices. J. introduced business which was transacted by E., J. paying out of pocket expenses and participating in the profits of the business introduced by him. Among the business so introduced was the conduct of the action. All payments and receipts passed through J.'s banking account, upon which E. had no authority to draw. Proceedings to recover the purchase-money from E. having failed, the plaintiff moved before Eve J. for a seven-day order upon J. to lodge it in Court. Upon the hearing of the motion it was objected that the Court had no jurisdiction to make a summary order against him.

Eve J. held that J. had assumed the privileges of a solicitor, and carried on legal proceedings as an officer of the Court, and was therefore amenable to the summary jurisdiction:—

Held by the Court of Appeal, on the evidence, that J. had not obtained possession of the purchase-money by holding himself out as a solicitor, and that the Court could not therefore treat him as a solicitor, or a person holding himself out as such, and exercise their summary jurisdiction against him.

In re Hulm & Lewis [1892] 2 Q. B. 261, distinguished.

APPEAL from a decision of Eve J.

The question arising upon the appeal was whether the Court

could, in the exercise of its summary jurisdiction over solicitors, make an order against the appellant, an unqualified person who was alleged to have assumed the privileges of a solicitor.

The question came before Eve J. upon a motion in a debenture-holder's action.

Middleton, the original plaintiff, was the holder of more than two-thirds of the debentures, and was appointed receiver of the company's undertaking and property charged by the debentures. On May 5, 1910, the usual judgment was pronounced in the action.

By an order dated November 15, 1910, a conditional contract entered into by the plaintiff and receiver for the sale of the company's assets and undertaking for 900*l.* was ordered to be carried into effect, and it was ordered that the plaintiff should lodge the purchase-money in Court. The contract was duly completed, and, after certain payments had been made out of the purchase-money, the net sum of 724*l.* was received by F. C. Evans, the solicitor acting for the plaintiff and receiver.

No part of this sum was ever lodged in Court, as directed by the order. After the completion of the contract Middleton went abroad, having assigned his interest in the action to Hurst, the present plaintiff, by whom the subsequent proceedings were carried on. It was recited in the assignment to Hurst that the purchase-money had been paid into Court. When this was ascertained to be incorrect, on the motion of Hurst an order was made that Evans should within seven days lodge the 724*l.* in Court. Nothing having been recovered under that order, the plaintiff moved that the appellant, T. W. Jones, who was no party to the action, should within seven days lodge in Court the sum of 680*l.*, part of the 724*l.* admitted to have been received by him with knowledge that it formed part of the purchase-money ordered to be paid into Court.

It appeared that the 680*l.* had come into the hands of the appellant under circumstances which were stated by Eve J. as follows. The appellant was for many years a solicitor's clerk, and since 1891 had carried on the business of a debt collector under the style of the Metropolitan Legal and Commercial Association. He became acquainted with Evans in February, 1905,

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and the two had been closely associated ever since, sharing the same offices and participating in the profits of any legal business transacted in the name of Coleman Evans or Coleman Evans & Co. All out of pocket expenses were provided by the appellant, and any loss was borne by him. Practically all the business was introduced by the appellant. Evans paid the appellant 1*l.* a week for the use of the office and furniture. Evans had no banking account, no safe, no furniture, and practically no clients of his own. All payments and receipts passed through a banking account in the name of the appellant, upon which Evans had no authority to draw.

Among the business introduced to Evans by the respondent was the litigation in this action, in the conduct of which the appellant took an active part, finding all the money required for out of pocket expenses, and himself attending appointments in chambers and before the judge. The appellant was not present at the actual completion of the purchase, but within a few hours of the receipt of the purchase-money by Evans the bulk, if not the whole of it, was handed to the appellant, and, of the bank notes paid by the purchaser, notes to the value of 680*l.* were within twenty-four hours paid by the appellant into his own account.

There was evidence that he had in fact also received as representing Evans the deposit of 100*l.* paid by the purchaser upon the execution of the provisional contract, and likewise a sum of 160*l.* on further account of the purchase-money.

Upon the hearing of the motion before Eve J. a preliminary objection was taken on behalf of Jones that the Court had no jurisdiction to make a summary order against him in the action.

Eve J. overruled the objection, holding that Jones had assumed the privileges of a solicitor, and carried on legal proceedings as an officer of the Court, and was therefore amenable to the summary jurisdiction.

From this decision Jones appealed.

C. J. Mathew, for the appellant. This is not a case in which the Court can exercise against the appellant the summary jurisdiction which it possesses over its own officers. There is no evidence that the appellant obtained this money by holding

himself out as, or pretending to be, a solicitor. In that respect this case differs from *In re Hulm & Lewis.* (1)

A. Adams, for the plaintiff. The appellant in doing what he did to obtain possession of this money assumed the position and privileges of a solicitor within the decision in *In re Hulm & Lewis.* (1) Substantially he was carrying on the business of a solicitor under the name of Coleman Evans & Co. On several occasions during the course of this matter he attended before the Master. He obtained the deposit of 100*l.* and a further sum of 160*l.* by representing himself as a solicitor. He is estopped from saying that he is not a solicitor and is not therefore amenable to the jurisdiction which the Court always exercises over its own officers. Attorneys and persons acting as such are treated on the same footing: Hawkins' Pleas of the Crown, 8th ed. vol. ii. pp. 206, 210; *Oppenheim* v. *Harrison* (2); *Wilton* v. *Chambers.* (3) Jones acted as a solicitor in hac re and has rendered himself amenable to the summary jurisdiction of the Court.

FARWELL L.J. With great deference to Eve J., who I know was exceedingly doubtful about this case, I am unable to find any ground on which the Court, which, according to Hawkins' Pleas of the Crown, 8th ed. vol. ii. p. 212, as a Court of record has a discretionary power in the government of its own officers, can exercise that summary jurisdiction against a man who is not its own officer, and who has not acted in the particular matter in such a way as to get money or property by holding out falsely that he was such an officer.

The facts as stated in Eve J.'s judgment are very short, and I need not go through them again. It is sufficient for this purpose to say that in this debenture-holder's action, in which the plaintiff was appointed receiver, the solicitor on the record for the plaintiff and receiver was one Evans. Evans was a man who employed another person, not a solicitor, on some contractual relation between them, the facts of which are set out by Eve J. It is immaterial to my mind, but I will

(1) [1892] 2 Q. B. 261. (2) (1756) 1 Burr. 20
(3) (1837) 7 Ad. & E. 524.

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Farwell L.J.

assume, for the present purpose, that Jones did in fact act, whether he held himself out or not, as a solicitor, without any justification for so doing. In the present action he acted simply on behalf of Evans, the solicitor on the record. He had no locus standi in any other capacity at all. The first thing that he did, and the only thing that he did directly, was, when an order was made for the sale of the property comprised in the debentures, and for the payment of the purchase-money into Court, to attend as representing Evans, the solicitor on the record, and obtain the deposit, or a part of the deposit. Now, it is quite plain that he could not have represented to the Court that he was a practising solicitor, acting as such in his own capacity, when he obtained that money, because if he had done so he would have defeated his own object, and could not have got the money; he could only get it as agent on behalf of Evans, who was the solicitor on the record. Then the next point is this: the purchase was completed, and the money was ordered to be paid into Court; it was paid to the plaintiff and receiver and the solicitor on the record, Evans, at Evans' office, and the next day Jones, coming into the office, in some way or other, with the consent of Evans, I suppose,—but it does not very much matter—obtained possession of the greater part, if not all, of the balance of the purchase-money. Now there again Jones, however wrongfully he acted, did not obtain that money by holding himself out to be a solicitor, or in any way acting as a solicitor. The money had gone into the hands of the solicitor on the record, and supposing he had stolen it from the solicitor on the record, however reprehensible his conduct, we should have no right to treat him as if he were a solicitor and use our summary jurisdiction over solicitors against him.

The exercise of this summary jurisdiction is a delicate matter, because it deprives the subject of his ordinary right of trial, and I certainly am not disposed to extend any such jurisdiction. Of course, all civil remedies, and all criminal also, are open to the present applicant against Jones, but it is quite another thing to say that the remedy is to be obtained by the use of the summary jurisdiction of the Court against its own officers.

Reliance was placed on the case of *In re Hulm & Lewis.* (1) I do not desire to express any opinion about that case at all, because to my mind it has no bearing on the present case. It was very peculiar. There was a firm of Hulm & Lewis; their name appeared as the solicitors on the record. They were to receive a certain sum in settlement, and an order was made which was served upon Lewis, and not upon Hulm; then Lewis said he was not a solicitor, but was managing clerk to Hulm, who was a solicitor, but their names had appeared as partners in a firm of solicitors; they had acted throughout; they had obtained orders, and had had orders made against them by the Court in the suit as such, and the Court took the view that a man, after having so acted, and having, by means of such wrongful assumption of a privilege to which he was not entitled, obtained from the Court orders which he could only have obtained in that particular capacity, was estopped from setting up any such plea to the jurisdiction as that he was not a solicitor as he pretended to be, and by means of which pretence he obtained the money. The correctness of *In re Hulm & Lewis* (1) is, of course, open to review in this Court, but it is not necessary for us now to consider it. In this case there is no estoppel at all. In my opinion, if the appellant had pretended to be a solicitor, as it is suggested he did, he never would have got the money. It was only by appearing and acting as the agent of Evans, who was the solicitor on the record, that he was enabled to obtain any of the money, and as regards the money which he took out of Evans' office the day after it was paid I see no case for proceeding against him as a solicitor at all.

The result is that we must allow the appeal, and decline to make any order on the application.

KENNEDY L.J. I am of the same opinion. I quite agree that this Court, and every Court, ought to be very careful in the exercise of this summary jurisdiction, which is no doubt, on occasion, a proper form of procedure, but the exercise of which nevertheless involves consequences which make this particular power of the Court one which the Court must exercise with the

(1) [1892] 2 Q. B. 261.

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greatest caution. In the present case the plaintiff succeeded in obtaining a declaration in his favour from Eve J. based, in substance, upon an allegation that the present appellant, though not a solicitor, acted as a solicitor, and therefore, as an officer of the Court, can be dealt with summarily in regard to an alleged offence committed by him. I think, myself, that in order to succeed in such an application you must shew that the act which is the basis of the application is an act done by the man as a solicitor unqualified in fact, but representing himself in the transaction to be a solicitor; and, more than that, obtaining by that representation either some property of which it is sought to divest him, or doing some act for which a remedy is sought which the Court can summarily give.

This case wholly fails when you come to look at that which, to my mind, is the keystone of the success of such an application, namely, that the man has, by virtue of his assumption of the position and privilege of a solicitor, either obtained something which he ought not to have obtained (I do not desire to limit it—there may be other cases, but broadly that would be generally the case), and therefore the restitution of which is just, or done some act for which there would be a remedy in the Court if it were an act done by an officer of the Court, and if the man has done the act or obtained the property by the assumption of the privilege and position of a solicitor. In such a case the Court will exercise the power which it would be right to exercise if the man were an officer of the Court; and in such a case the man cannot be allowed to say that he is free from the jurisdiction of the Court because he is not, in fact, a solicitor, and therefore not an officer of the Court.

When you come to look at the case of *In re Hulm & Lewis* (1), as Farwell L.J. has said, it is open to review in the future. It is unfortunate that it was not argued on the part of the respondent to the application, but I am willing to assume that it was quite rightly decided, and in my opinion, fairly read, the judgments of both Mathew J. and Collins J. turn upon this, that it was, as Mathew J. said, in the capacity of solicitor that the respondent obtained the documents and the

(1) [1892] 2 Q. B. 261.

money in question, or, as put by Collins J., that he obtained possession of the money and documents by fraudulently pretending to be a solicitor.

In this case the appellant obtained possession, unfortunately, of this sum of money from the solicitor on the record and the receiver by no sort of representation that he was a solicitor. Both of them knew that he was not a solicitor. In consequence of the business relations which existed between himself and them, he, unfortunately, had an influence over them, which enabled him to obtain possession of this money, which he ought not to have done. It has been pointed out with regard to earlier applications that he was representing himself to be acting for the solicitor on the record, whether he called himself a clerk or not, but in this particular case we have nothing to do with what he represented himself to be on previous occasions, because it is to my mind irrelevant to this application, the success of which must depend upon this, that he acted in regard to the particular transaction in respect of which the order of the Court is invoked, and did the thing, or was enabled to do it, by his assumption of the character of solicitor, which he did not enjoy. I think, myself, there is a further distinction between this case and *In re Hulm & Lewis* (1), namely, that there the Court was dealing with a man who held himself out as the solicitor on the record; he called himself Hulm and Lewis, whereas Lewis, who was the person against whom the proceedings took place, was not a solicitor in fact, but did pretend to be so, and the act in question was done by him, and he got an advantage which he ought not to have got, by his wrongful assumption of the capacity of solicitor on the record.

I think that this appeal must be allowed.

Solicitors: *George Jolly; Jaques & Co., for Turnbull & Sons, Scarborough.*

(1) [1892] 2 Q. B. 261.

G. A. S.

C. A.
1912
July 8, 9.

Followed. *In re* FREELAND [1952] 1 Ch. 110

In re PINK.
PINK *v.* PINK.

[1911 P. 2201.]

Debt—Release—Cancellation—Will—Construction—Deduction of Debts from Settled Legacies—Advances by Testator—Entries in Testator's Ledger—Release of Debt—Continuing Intention—Appointment of Debtor as Executor.

A testator during his life made advances of 9800*l.* to his son-in-law M. In the testator's ledger there was an entry with respect to M.'s debt in 1905 that 5000*l.* had been given off the debt for an object arranged with M.'s wife; and in June, 1909, there was a further entry, "This debt is absolutely cancelled from this date, viz., 4800*l.* and interest. Edward Pink." By his will, made in March, 1908, the testator appointed M. to be one of his executors and settled a sum of 20,000*l.* and one fourth of his residue upon M.'s wife and children and directed that if M.'s wife should die within seven years of his death any sum due from M. should be absolutely extinguished, and that any loss sustained in respect of any indebtedness of M. should be credited as a loss to the trust legacy of 20,000*l.* and not as a loss to his residuary estate. Upon a summons by the legal personal representatives of the testator to have it determined whether the debts were still due, Eve J. held that there was not sufficient evidence of an intention by the testator to make a gift, and even if there were such an intention or an imperfect gift it was not perfected by the appointment of M. as executor, that the case did not come within *Strong* v. *Bird* (1874) L. R. 18 Eq. 315, and that the whole debt of 9800*l.* was still due.

M. and his wife appealed:—

Held (varying the order of Eve J.), that as to 5000*l.* the indebtedness continued, but as to 4800*l.* it had been released by the testator, and the defect in M.'s title had been cured by his appointment as executor. The only debt therefore that could be enforced against him was that of 5000*l.*

Appeal from a decision of Eve J. (1)

By his will, dated March 12, 1908, the testator, Edward Pink, appointed the defendant Sir Thomas Pink, and his son-in-law the defendant Arthur Moore, and the two plaintiffs, Harold Rufus Pink and Leonard Montague Pink, executors and trustees thereof, and, after making certain specific devises and bequests and giving certain legacies, he devised and bequeathed all the residue of his real and personal estate to his trustees upon trust for sale and

(1) [1912] 1 Ch. 498.

conversion, and, after payment of debts, to set apart and appropriate three several sums of 20,000*l.* for his two daughters Caroline Rayner and Emily Moore, and for the children of his deceased daughter, Laura Warland, such sums, together with three one-fourth parts of his residuary estate, to be held by his trustees upon trust for the benefit of his two daughters and their families and the children of the deceased daughter as therein declared; and the testator directed that any sum of money that might at his death be due to him from his son-in-law E. H. Rayner should not be called in by his trustees for a period of five years from the date of his death, provided that interest at the rate of 4 per cent. per annum should be punctually paid; but in case interest should not be so paid, or in case of the bankruptcy of his said son-in-law, the whole amount of principal and interest should, in such case, immediately become payable. And the testator further declared that any sum of money that might be due from his son-in-law Arthur Moore should, if his daughter Emily Moore should have predeceased the testator, or should die within seven years after his death, be absolutely extinguished, and to the intent that, should Emily Moore survive him, his trustees should have no claim to the amount so owing until the expiration of seven years from the date of his decease, in which case the trustees might, during the eighth and each succeeding year after his decease, require payment of the amount owing by instalments, not exceeding 250*l.* a year, with interest at 4 per cent. per annum; and the testator declared that any loss that might be sustained in respect of any such indebtedness, whether of the said E. H. Rayner or of the said A. Moore, should be treated as a loss to the trust legacy of 20,000*l.* thereby bequeathed to the wife of the debtor, and not as a loss to his residuary estate.

The testator died on July 19, 1910, and his will and two codicils thereto were proved by all the executors named in the will. The testator had from time to time during his lifetime advanced various sums of money to his two sons-in-law, the account of such sums being kept by the testator in a ledger in his own handwriting. From this it appeared that up to 1909 there had been advanced to E. H. Rayner 5800*l.*, and to A. Moore 9800*l.* No part of such sums had been repaid to the testator or

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to his executors, nor had any security been given for the advances. No interest had been paid by E. H. Rayner. In the ledger there appeared an undated entry in the testator's handwriting, at the foot of the ledger account of E. H. Rayner (the last entry in which was dated July 12, 1892), as follows: "This debt is cancelled as altogether bad, debtor being bankrupt. E. Pink." In relation to the account in the ledger against A. Moore there was an entry at the foot of the account (the last entry in which was July 5, 1905), as follows: "5000*l.* is given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date"; and on June 2, 1909, there was this entry: "This debt is absolutely cancelled from this date, viz., 4800*l.* and interest. Edward Pink."

E. H. Rayner was adjudicated a bankrupt on February 10, 1908; his assets were nil, and he had never obtained his discharge. The testator made no proof in the bankruptcy for his debt.

There were no children of Arthur Moore and his wife. The fact of the two entries being made in the ledger was communicated by the testator to Mrs. Moore alone.

On October 26, 1911, an originating summons was taken out by Harold Rufus Pink and Leonard Montague Pink for the determination of the questions, inter alia, whether the debts in respect of sums of money from time to time advanced by the testator in his lifetime to the defendants Arthur Moore and Edward Howard Rayner, his two sons-in-law, respectively, and amounting in the aggregate to 9800*l.* and 5800*l.* respectively, had, by virtue of the entries in the testator's ledger, been legally and effectually released and cancelled by him in his lifetime, or whether such sums or any part thereof were due and owing to the testator at his death.

Eve J. held that as to the debt of Moore there was not sufficient evidence of an intention by the testator to make a gift, and even if there were such an intention or an imperfect gift, it was not perfected by the appointment of Moore as executor, and that the whole debt was still due.

Moore and his wife appealed.

Younger, K.C., and *P. F. Stokes*, for the appellants. By the appointment of Moore as executor the debt due by him to the testator was gone at law. In equity he would still be accountable, and to induce the Court to hold that the debt had come to an end some further reason must be shewn. If we can shew that the testator had himself given up the debt, that is enough to enable the Court to say the debt is extinguished. The entries in his ledger shew a continuing intention on the part of the testator to give up the debt, and that is sufficient within *Strong* v. *Bird* (1), *In re Applebee* (2), and *In re Stewart* (3): Williams on Executors, 10th ed. vol. i. p. 1058. For this purpose there is no distinction between the 4800*l.* and the 5000*l.*; they are parts of the same transaction. The entries in the book are sufficient evidence: *Eden* v. *Smyth* (4); *Aston* v. *Pye.* (5) The intention to give must be proved to be altogether apart from the will, otherwise evidence will not be admitted to prove intention. There must be an intention to make an immediate gift: *Peace* v. *Hains.* (6)

P. O. Lawrence, K.C., and *J. S. Green*, for the infant children of a deceased daughter. The testator directs by his will that any money which at his death is due to his estate by Moore shall be dealt with in a particular way. That is inconsistent with giving up the debt. The declarations in the testator's ledger are not admissible as evidence, and there is nothing to shew that he gave up the debt. Therefore this case does not come within the principle of *Strong* v. *Bird* (1), *In re Applebee* (2), and *In re Stewart.* (3) An intention to release the debt will not do; there must be an actual release.

[FARWELL L.J. The question is whether an informal release of the debt may not have been perfected by the appointment of the debtor as executor.]

The entries had no effect at all. The direction in the will distinguishes this case from the authorities which have been cited. The only question is whether this debt or any part of it was due from Moore at the date of the testator's death; and we contend that the testator could have sued for it at that moment. In

(1) L. R. 18 Eq. 315.
(2) [1891] 3 Ch. 422.
(3) [1908] 2 Ch. 251.
(4) (1800) 5 Ves. 341.
(5) (1788) 5 Ves. 350, n.
(6) (1853) 11 Hare, 151.

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equity an incomplete gift must be shewn as well as the appointment of the debtor as executor which perfects it. Here the will contains a direction contrary to the presumption and the language is wide enough to cover the whole debt. It was due at the date of the testator's death and the provisions of the will apply to it. The onus is on the debtor to shew a continuing intention on the part of the testator to discharge the debt and the evidence is not sufficient.

C. J. W. Farwell, for Sir Thomas Pink, supported the appellants.

Owen Thompson, for Mrs. Rayner, supported the infants.

Bradley Dyne, for the executors other than Moore.

Younger, K.C., in reply.

COZENS-HARDY M.R. This is an appeal from a decision of Eve J., and it raises points of law of considerable difficulty. The question is whether Mr. Moore, who has been made an executor of the will, is or is not liable to pay, according to a scheme which is set out in the testator's will, a large sum of money, or at any rate the sum of money which is shewn by entries in the testator's ledger to have been due from him, which sums are really not disputed as having been due to the testator's estate from Mr. Moore. But it is said that, Mr. Moore having been appointed executor and having proved the will of his father-in-law, any debt which was due from him to the testator in the testator's lifetime is gone at law, because at law a man could not be both a plaintiff and defendant. It is also said that the debt being gone at law, although that would not exempt the executor from accounting for the money as part of the testator's estate, which indeed he would be said to have had in his pocket, namely, his own debt, yet there is sufficient evidence here to satisfy the Court that it was never intended by the testator that he should pay in the event of his death; and that it amounts to what may be called in one view an equitable release, or in the other view what may be called a presumption of accountability negatived by the circumstances of the case. The testator was a man of large fortune. I cannot say that he was a good accountant, because in his private ledger which is before me he states the advances, very numerous

and very large, which he made to his son-in-law, Mr. Moore, and when I come to 1903 I find: "All interest paid to the 1st of July; after that date interest to be at 4 per cent."; and then I come to the critical pages, 44 and 45, and, strange to say, although he debits Mr. Moore with capital advances, he does not debit him with any interest on these advances, but he credits him with certain small payments for interest on them; and nowhere, except in the two points which I have indicated, is anything like a balance struck, and in no point of view can this be considered an accurate statement of the indebtedness.

The testator made his will on March 12, 1908, and by that will, after appointing Mr. Moore one of the executors and dealing with the residue and giving a settled legacy of 20,000*l.* to Mrs. Moore and the children of the marriage, and giving also a share in the residue, he gives certain directions with reference to Mr. Moore's indebtedness. [His Lordship referred to the will.] That was on March 12, 1908. In this book which I have before me there are two entries, one with no date against it, but an entry which was made more probably some time in February, 1907, than at any other date. It is this: "5000*l.* is given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date." What does that mean? As I read it, that is not a release of the debt; it is inconsistent with a release of the debt. If it is anything it is a gift of part of the debt for some definite object, the terms and the nature of which are not stated, and which have not been stated by Mrs. Moore in the affidavit which she made. But she says in her affidavit, in paragraph 6: "My father frequently spoke to me about money matters and he said he would give me 5000*l.* which I might apply as I thought proper in certain directions which he indicated. Afterwards he said to me that he had decided not to give me the 5000*l.* but to write it off my husband's indebtedness. This remark of his refers to the earlier entry under date of 5th of July 1905 in my father's ledger." I am very anxious to make it quite clear that I am not for a moment suggesting any intentional inaccuracy on the part of either Mr. or Mrs. Moore, but one cannot be too careful in dealing with the estate of a deceased man to remember that an affidavit in support of a claim or a release must be very carefully

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scrutinized, and I have come to the deliberate conclusion that the only things we can rely upon here, in the sense of acting upon them, are the entries in the testator's own handwriting in this book which I have before me. Mrs. Moore's statement clearly is inconsistent with the entry in the book, "5000*l.* is given off this debt for a definite object arranged between me and Mrs. Moore." If that was the intention of the gift, it has failed; it has not been carried out; it is an imperfect gift of the 5000*l.* in respect of which no claim can be made. That 5000*l.*, as it seems to me, must stand unaffected by the imperfectly carried out intention of the testator, which it may be he varied thereafter, at some date we do not know, but which certainly has led to such a state of confusion that it is impossible for us to say that the 5000*l.* was ever released to the debtor in the sense in which it is necessary for the present claimant to establish his title.

The other item is rather different. It turns upon this. The account in the book having been adjusted—I cannot say balanced—in a certain sense by deducting the 5000*l.* which was intended to be given for a specific purpose, not to be released, but having been reduced according to this book to 1550*l.*, then there were further advances which together make up 4800*l.* up to March 1, 1909. Then on June 2, 1909, there is this entry in the testator's handwriting: "This debt is absolutely cancelled from this date, namely, 4800*l.* and interest." It is quite clear that we must deal with it fairly and give Mr. Moore the benefit of that entry. It is not all the debt, whatever it may be, that is cancelled, but "namely, 4800*l.* and interest." I cannot carry that memorandum any further than that. But to that extent I think it is good evidence that the testator did intend then and there to release that debt and absolutely cancel it from that date, namely, 4800*l.* and interest. Is there any reason why effect should not be given to that? In my opinion *Strong* v. *Bird* (1), which is an authority nearly forty years old, and which so far as I remember has never been questioned and has certainly been repeatedly followed, carries Mr. Moore through as to this item. *Strong* v. *Bird* (1) really proceeds upon this footing. I indicated in the beginning of this judgment that a mere

(1) L. R. 18 Eq. 315.

declaration of this kind in the testator's handwriting, "This debt is absolutely cancelled from this date," is not sufficient standing by itself. There is no consideration for it. It is not a perfect release; it is not a release at law; and therefore if there is nothing more it would have no operation or effect whatever on the relation of debtor and creditor between the testator and the debtor. But when you find that the debtor is constituted one of the executors of the testator, and thus acquires at law a title to it, then the Court feels itself at liberty to look at the matter and to say whether there is in the circumstances any ground for holding that the equitable liability of the executor to account ought not to be given effect to, because the Court is satisfied that it is contrary to the wishes and intentions of the testator. Applying that principle here, I think that this 4800*l.* and interest was validly released and ought not now to be claimed.

Mr. Lawrence endeavoured very ingeniously to distinguish *Strong* v. *Bird* (1) on this ground. He says that it is not here a mere case of the appointment of an executor, but there is an appointment of an executor with special directions as to what should be done with this particular debt, and that therefore that circumstance ought to make *Strong* v. *Bird* (1) inapplicable, and he seeks to say that there is something in *Strong* v. *Bird* (1) which tends to support that argument. I am quite unable to follow that. The clause in the will which I have read only applies to "debts which shall be owing at my death," which I think means, not "the moment before my death," but "after my death,"—the moment when the will comes into operation—and if the view which I take of this entry of June 2 is correct, that was made after the will and before the codicil. In those circumstances I think it would be giving an unreasonable effect to the words of the will to say that they have the effect of rendering inoperative the presumption of law which was given effect to by Sir George Jessel M.R. in *Strong* v. *Bird*. (1) On the whole, therefore, with great respect to Eve J., I think his decision cannot be supported as to the 4800*l.*, but that it is right as to the 5000*l.* and interest—in fact as to everything except the 4800*l.*

(1) L. R. 18 Eq. 315.

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FARWELL L.J. I am of the same opinion. The appointment by the creditor of his debtor as executor operates as a release at law of the debt. Lord Thurlow L.C. in *Carey* v. *Goodinge* (1) "said he thought it had been a settled point in this Court, that the appointment of the debtor executor, was no more than parting with the action"—that is to say he cannot sue at law and he is relegated to equity. In equity the appointment of the debtor was not a release. If the estate was insolvent it was simply inoperative and had no effect at all; the debtor was treated as though he had paid himself and he had to account for the amount of his own debt as part of the assets. When all the estate had been cleared, and it became a mere question between volunteers, there were on one side the persons taking as beneficiaries by the testator's bounty under his will, and on the other side the executor having the legal title in the property in question, or rather having the only means of enforcing the legal title, and there is then a question of countervailing equities. Is there anything which will enable the beneficiaries under the will to say to the debtor "You hold that debt as a trustee for us"? Since *Strong* v. *Bird* (2) we must regard the matter in the light given us by that decision. It is plain that a mere intention to give, not carried out during the lifetime, will not do, because that would in effect be to allow a man to dispose after his death of his property by a document not testamentary. It is plain also that a mere intention to give is not enough, because you want an immediate gift. If there is an immediate gift, then the resulting trust for the benefit of the beneficiaries is rebutted. I venture to think that the illustration given by Sir George Jessel (3) lacks one explanatory sentence to make it accurate. I think his Lordship was thinking, not of a voluntary conveyance by the owner to A. B., because that would be perfectly binding, unless the owner afterwards sold to a purchaser for value, but of the conveyance on purchase by the owner to A. B. by C.'s direction, in which case the resulting trust for C., who finds the money, does arise. I am speaking now apart from any family relationship between the parties. It was a resulting trust of that

(1) (1790) 3 Bro. C. C. 110, 111. (2) L. R. 18 Eq. 315.
(3) L. R. 18 Eq. 318.

nature which he had in his mind, and the illustration he gives is that there was evidence to shew that the owner had given the property to A. B. and had directed a conveyance in order to effectuate such gift. In the same way here there is in one case a clear release of the debt for the benefit of the debtor; he is executor and the estate is solvent, and that is sufficient in my opinion to prevent the residuary legatees from calling on the executor debtor to pay the debt which has been so cancelled.

As regards the 4800*l.* it is reasonably plain that that was absolutely cancelled, so that there was an extinguishment in præsenti, and on the principles which I have attempted to state that sum cannot be now claimed by the residuary legatees. As regards the other, it stands on a different footing, and I think the appeal must fail as to that. The most satisfactory evidence that we have is the testator's own ledger. Very little reliance can be put on the very inaccurate evidence in the case, which does not condescend to dates at all—dates which are or might be most material. Looking at the entries I have before me relating to the 5000*l.*, it is reasonably plain that what happened was this: on February 5, 1907, the testator added up the debit side; he then deducted from it 5000*l.*, and he then made a note on the other side to shew why he had so deducted it. Then the deduction of 5000*l.* is not, as the 4800*l.* is, absolutely cancelled. On the contrary it is not released to the debtor at all. It is "given off this debt for a definite object arranged between me and Mrs. Moore as from July 3, 1906, with interest due to that date." The meaning of that is this: "I do not intend myself to be paid the whole of this 6550*l.*; I mean to transfer 5000*l.* of it to my daughter for a purpose which we have arranged." But he does not do so. On what possible ground can the debtor say that there is a present intention to release him, the debtor, when the object is not to release him, but to transfer his indebtedness to somebody else? Then it is said that on June 2, 1909, the account is carried down on the footing that the 5000*l.* has been eliminated from it so that the net balance is 4800*l.*, which is cancelled. But the answer to that is this. There is nothing to shew when this scheme or intention of transferring 5000*l.* to Mrs. Moore was abandoned. It certainly was abandoned

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and never was carried out. Mrs. Moore herself says that it was abandoned, and for anything that one can tell it is quite consistent with the facts that the intention continued until after June 2, 1909. The testator did not die until July 19, 1910, so that when he made that entry of cancellation he might still have had in his mind the intention and the anticipation of handing over and transferring to his daughter that 5000*l.* part of the debt. If that is so, there is no force in the argument that the 4800*l.* shews that that was all that was left of any real debt. It fails on both of those grounds, namely, that that is not the true interpretation, and that on no interpretation that I can find is it possible to say that there is any cancellation of the 5000*l.* part of the debt; there was only an inchoate intention not carried out of transferring the indebtedness to somebody else. On those grounds I think the appeal fails in that respect, but on the other point it should succeed.

KENNEDY L.J. With regard to the law of the question which has been stated there seems to be no doubt. We have the authority of Sir George Jessel in *Strong* v. *Bird* (1), an authority which has been acted on since in a reported case before Neville J, *In re Stewart* (2), and after what has been said in the judgments of the members of this Court already I only desire myself to add that, as I understand it, it is quite clear that what is spoken of both in the head-note in *Strong* v. *Bird* (1), and also in *In re Stewart* (2), as a continuing intention on the part of the testator, or the testatrix as the case may be, means a continuing intention that the gift should have been given at the time when it was given. Of course it cannot apply to an intention to make a testamentary benefaction, because in that case it would be bad unless it conformed to the rules of law with regard to such benefactions, and I respectfully regret the expression "a continuing intention," which might seem to indicate a continuing intention at the date of the death to do something at the testator's death, which is certainly not that which would give validity to an imperfect gift. What I understand it to mean, and to be intended by the decision in *Strong* v. *Bird* (1), is that,

(1) L. R. 18 Eq. 315. (2) [1908] 2 Ch. 251.

where a testator appoints a debtor as his executor, in equity as well as in law any indebtedness which might otherwise have been held to exist from the debtor to the testator will not be held to exist if there has, before that, been a gift which was intended to be a gift, although that gift was not complete according to law and could not merely as it stood have been held to forgo or discharge any portion of the debt had the question arisen in the testator's lifetime.

Now, if the law of *Strong* v. *Bird* (1) is to be applied, it has to be applied in this case to two sums. With regard to the 4800*l.* I do not myself entertain any doubt that this appeal ought to succeed. There is the clearest evidence specifying that particular sum, and I do not think that the words in the will which were relied upon a good deal by the respondent, in which the testator speaks of any indebtedness from the executor, at all affect that which is a definite statement of a release, so far as he could by his statement release the 4800*l.* according to the entry made on June 2, 1909.

I confess that, for my own part, I have had considerable doubt as to whether the same decision ought not to follow with regard to the 5000*l.* Whatever criticisms may be justly made upon the nature of the books and the entries taken by themselves, there is at any rate this to be said, which has been adverted to, namely, that if there was, as the testator puts in writing, on June 2, 1909, a sum of 4800*l.* and interest which he desired to treat as a debt cancelled, that can only as a matter of arithmetic be arrived at by treating the account as having been already to the extent of 5000*l.* at some previous date altered in favour of this executor. It is a balance that can only be arrived at by taking out of the account as against the executor a sum of 5000*l.*, and that I confess has pressed upon me, and to some extent does press upon me, because, while it is quite true that on the evidence there is an uncertainty as to the date of the entry, and Mrs. Moore in her affidavit has sworn that whereas the original intention was to give the 5000*l.* to her for a definite object, it was subsequently, as the testator himself told her, altered to a gift of the debt to the debtor himself, yet it is clear at any rate that

(1) L. R. 18 Eq. 315.

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something of that kind may be fairly argued to have taken place before the statement of the balance given on June 2, 1909. But it is quite true also that one cannot in dealing with questions affecting the estate of a deceased person be too careful in refusing to accept in release of a debtor anything except that which is perfectly satisfactory evidence; and it is true that one would rather have expected, if this original entry of July 5, 1905, as to the 5000*l.* "given off the debt" as he calls it for a definite object to the daughter had been cancelled by a subsequent and quite different disposition of 5000*l.* as a gift to the debtor, that that entry would have been cancelled and an entry explaining the cancellation have been made. All that we have is that not at that date, July 5, 1905, but at an uncertain date, probably, if one had to conjecture, February 5, 1907, a sum of 5000*l.* was placed to the credit of the debtor on the account. Of course the gift to Mrs. Moore for a definite object has not been carried out. The evidence is that it was not intended by the testator to be carried out. The question is whether what she speaks of as the substituted intention of the testator to give that money to the debtor is proved. I do not think upon the whole, on the balance of the evidence, that I ought to come definitely to a conclusion differing from that of the other members of the Court upon that question of evidence, because undoubtedly the date, if any, to which should be assigned such an intention to give the 5000*l.* is left quite obscure, and the matter is complicated by the fact that the original entry in favour of the daughter remains standing, and there is nothing to shew when that per contra entry of 5000*l.* was made. In the absence of something more definite it seems to me that, the burden of proof resting in this case upon the executor,—who is unquestionably a debtor in equity for all such debts as he cannot be proved to have got rid of by the gift of the testator,—that burden of proof has not been sufficiently discharged upon the evidence which is before us. I therefore concur in the judgments which have been already given.

Solicitors: *Parker, Garrett & Co.; Arthur Tyler; Hicklin, Washington & Pasmore; Beard & Sons.*

H. C. R.

In re POULTNEY.
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1912
June 19.

[1911 P. 1113.]

Will—Construction—Class Gift after Life Estate—Class to be ascertained at Testator's Death—Gift over to "Survivors"—Survivorship referring to Period of Distribution.

Testator devised and bequeathed all his real and personal estate to his wife for life and then made the following disposition:—"and from and after her decease upon trust to divide my trust estate equally between my children as hereunto described"—naming eight—"and all others born under wedlock (if any)." The last clause in the will provided as follows: "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors."

The eight named children survived the testator, but one of them died in the widow's lifetime leaving children:—

Held, that inasmuch as the original gift to the testator's children was a gift to a class to be ascertained at the testator's death, the final direction must apply to the death of a member of that class during the lifetime of the widow, otherwise it would be meaningless; and that only those children who survived the widow were entitled to share in the testator's estate.

Cripps v. *Wolcott* (1819) 4 Madd. 11, applied.

Decision of Joyce J. [1912] 1 Ch. 245, reversed.

Appeal from a decision of Joyce J. (1)

By his will the testator, James Poultney, devised and bequeathed all his real and personal estate to his wife, Sarah Poultney, for her own use and benefit for her life, and then made the following disposition:—"And from and after her decease upon trust to divide my trust estate equally between my children as hereunto described"—naming eight—"and all others born under wedlock (if any) I empower my said executrix her heirs or assigns for the time being from time to time to dispose of a part of my trust estate if required but with the free consent of my said executrix during her life as may be deemed

(1) [1912] 1 Ch. 245.

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expedient And I . . . . appoint my dear beloved wife Sarah Poultney my sole executrix of this my will." Then came the testimonium, and between it and the testator's signature was the following direction:—"I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors." Then followed the testator's signature and the attestation clause.

The testator died on March 12, 1880, possessed of real and personal estate, and his widow duly proved his will.

The eight children named in the will survived the testator, but one of them, Sarah Elizabeth Davies, died in the widow's lifetime, intestate and leaving issue.

The testator's widow died on July 1, 1910.

The testator's eldest son and administrator de bonis non subsequently took out this summons, to which the testator's six other surviving children and G. H. Davies, the eldest son of the deceased daughter, were defendants, for the determination of the question whether the heir and personal representative of Sarah Elizabeth Davies were entitled to share in the estate of the testator.

Joyce J. held that the final clause in the will ought to be construed as operating only during the testator's lifetime; that upon his death the shares vested; that the final clause ought not to be held to divest any of the shares so vested; and that accordingly the share of Sarah Elizabeth Davies went, as to realty, to her heir, and, as to personalty, to her legal personal representative.

From this decision the defendants, the six children of the testator, appealed.

George Henderson, for the appellants. This case falls clearly within the rule in *Cripps* v. *Wolcott* (1), which is well settled and is one which the Court never seeks to evade by slight distinctions: Jarman on Wills, 6th ed. p. 2131. This is a class gift excluding the operation of s. 33 of the Wills Act. Under the first gift in the will those members of the class who survive the testator take vested interests at his death, and then the final

(1) 4 Madd. 11.

direction in the will contains a gift over in a certain event, and if any effect at all is to be given to that direction, "survivorship" must be referred to the death of the tenant for life.

T. T. Method, for G. H. Davies. *Cripps* v. *Wolcott* (1) was a clear case and I do not dispute it, but this is a totally different case. Here "survivor" refers to the last antecedent—*Scurfield* v. *Howes* (2); *White* v. *Baker* (3)—that is, to the period of vesting, and so must be restricted to death during the testator's lifetime: Hawkins on Wills, pp. 263, 264; *Bouverie* v. *Bouverie*. (4)

These shares are vested at the death of the testator, and once vested they will not be divested: *Jackson* v. *Dover*. (5)

Bischoff, for the trustees.

Cozens-Hardy M.R. I am sorry to say I cannot take the same view of this will as Joyce J. has done. In this case the matters of fact are not involved, nor do I think, when one considers it, that there is very much difficulty in the case.

The testator gave all his property to his wife for life, and after the wife's death left it upon trust to be divided between the children he then had and all others (if any) born under wedlock. That is a class gift, and the class to take can only be ascertained at his death. He then goes on to empower his executrix "to dispose of a part of my trust estate if required but with the free consent of my said executrix during her life as may be deemed expedient." I do not stop to consider that now, but that may or may not be a power to advance to some of the children with the wife's consent during her lifetime.

Then the will goes on to say "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors." The real question is what does "death" mean, and when must the survivorship be ascertained? Now from one point of view, which was the view taken by the learned judge, death means death in the lifetime of the testator, but that interpretation of the word would render the direction in the last clause of the will of no use

(1) 4 Madd. 11.
(2) (1790) 3 Bro. C. C. 90.
(3) (1860) 2 D. F. & J. 55, 64.
(4) (1847) 2 Ph. 349.
(5) (1864) 2 H. & M. 209.

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at all. The class to take under the original gift is a class in existence at the death of the testator, and therefore it is impossible to give any effect whatever to the last clause of the will if the true view is that it refers only to death in the lifetime of the testator. We ought not to construe this last clause so as to render it in every event inoperative, because that would be contrary to every rule of construction.

The other view is this. The general rule as laid down in *Cripps* v. *Wolcott* (1) is that where there is a gift to A. for life with remainder to A., B., and C., and to the survivors or survivor, the survivorship is ascertained at the death of the tenant for life. We have been referred to *White* v. *Baker* (2), and it seems to me that there is a passage in the judgment of Turner L.J. in that case which is exactly and precisely in point. He says (3): "Where there is a bequest to A. for life and after his death to B. and C. or the survivor of them, some meaning must of course be attached to the words 'the survivor.' They may refer to any one of three events—to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life, and in the absence of any indication to the contrary they are taken to refer to the latter event as being the more probable one to have been referred to." I think that there are several indications in the will to shew that that is the true view. In the first place, the words of the original gift are "upon trust to divide" at the death of the tenant for life. I do not wish to lay too much stress upon those words because I have no doubt that under the original gift the interests are vested at the death of the testator, but still there is in the original gift a direction to divide the estate at the death of the tenant for life, and the words "to be equally divided" occurring in the final clause must, in my opinion, be taken as referring to the same period of division. Further, there is this, that in any other view I should give no effect whatever to the direction at the end of the will. But I do give full effect to that direction if I say that in the first part of the will the testator directed his estate to be divided between a class living at his death, and that when in

(1) 4 Madd. 11. (2) 2 D. F. & J. 55.
(3) 2 D. F. & J. at p. 64.

the final clause he says "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors" he is directing a division amongst a different class consisting of those of the former class who survive the death of the tenant for life. That being so, I think that the word "survivors" means those who shall survive the period of distribution named, and in my opinion this appeal should be allowed.

FARWELL L.J. I am of the same opinion. The rule in *Cripps* v. *Wolcott* (1) is too well settled to be whittled away now, and the statement by Turner L.J. in the passage read by the Master of the Rolls shews it to be absolutely clear law. Mr. Method has relied on the next sentence to that read by the Master of the Rolls, where the learned Lord Justice says (2): "Where, as in the present case, the bequest is to A. for life and after his death to B. and C., and in case either of them dies in the lifetime of A. the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other, and the question is not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used." But unfortunately for Mr. Method's argument, it is not "if either of them dies in the lifetime of A.," but "if any of them die in the lifetime of the testator," but that makes the word "survivor" have no meaning, for those who die before the testator can take nothing. Therefore there is nothing to displace the ordinary rule laid down in *Cripps* v. *Wolcott* (1), and when I find that the only gift is in the word "divide" and that the alteration is also made by the use of the word "divided," it is clear to my mind that what the testator intended to do was to alter the class amongst whom the trust fund was to be divided in accordance with his original direction in the earlier part of the will. Therefore I am unable to agree with the construction of the learned judge.

KENNEDY L.J. I agree, and have nothing to add.

(1) 4 Madd. 11. (2) 2 D. F. & J. 64.

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COZENS-HARDY M.R. There will be a declaration that the heir-at-law and the legal personal representative of the deceased child are not entitled to any share in the testator's estate.

Solicitors: *Simpson, Palmer & Winder; J. E. Anthony.*

R. M.

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METROPOLITAN WATER BOARD *v.* PHILLIPS.

[1911 M. 1059.]

Water — Rates — Metropolis — Quinquennial Valuation—Provisional List—Supplemental List—"In force at the commencement of the quarter"—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 13—*Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 43—47.

The defendant was the occupier of premises called "The Brown Bear," in Aldersgate Street, London, E.C. These premises were, during the quarter from October 1 to December 31, 1910, and the preceding and succeeding quarters, supplied with water by the plaintiffs.

In 1908 the valuation list for the parish of the city of London was altered by the making of a supplemental valuation list, in which the rateable value of the "Brown Bear" was shewn at 400*l.* This supplemental list came into force on April 6, 1909. On June 2, 1910, the overseers of the parish sent to the assessment committee, pursuant to s. 47 of the Valuation (Metropolis) Act, 1869, a provisional list, in which the "Brown Bear" was included at the reduced rateable value of 399*l.*, and on June 23, 1910, the committee's clerk served on the defendant, as occupier, a copy of so much of the provisional list as related to the "Brown Bear," with a notice specifying a day on or before which any objection to the list might be made. On October 3, 1910, the committee considered the provisional list and reduced the rateable value to 234*l.*, thereafter returning the list and a copy, after being dated on that day and signed by their clerk, to the overseers in accordance with s. 47 of the Act of 1869.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, payment for water supplied is to be at a rate per annum not exceeding 5 per cent. of the "rateable value" of the house or building in respect of which the supply is required. By s. 13 of the Charges Act "the rateable value . . . . for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues." The water rate is payable in advance, and by s. 15 the quarterly days for its payment are April 1, July 1, October 1, and January 1 in each year:—

Held by the Court (Farwell and Kennedy, L.JJ., dissentiente Cozens-Hardy M.R.), that the provisional list came into force on

June 23, 1910; that the "valuation list in force" on October 1, 1910, was therefore the supplemental list made in 1908, as altered by the provisional list; and that the defendant was liable to pay the rate payable on that date on the rateable value of 234*l.* instead of 400*l.*

Decision of Parker J. [1912] 1 Ch. 296, reversed.

APPEAL from a decision of Parker J. (1)

In this action a special case was stated by consent for the opinion of the Court, pursuant to the Rules of the Supreme Court, 1883, Order XXXIV., and was, so far as material, as follows:—

1. This action was commenced on April 27, 1911, by a writ of summons whereby the plaintiffs claimed: (1.) A declaration that upon the true construction of the Metropolitan Water Board (Charges) Act, 1907, the water rate for the defendant's premises, "The Brown Bear," 79, Aldersgate Street, in the city of London, for the quarter from October 1 to December 31, 1910, ought to be calculated upon a rateable value of 400*l.* as being the rateable value thereof according to the valuation list in force at the commencement of the said quarter. (2.) Payment by the defendant to the plaintiffs of 5*l.*, being at the rate of 5 per cent. upon a rateable value of 400*l.*, for one quarter's water rate on the said premises from October 1 to December 31, 1910, and of 2*l.* 18*s.* 6*d.*, being at the rate of 5 per cent. on a rateable value of 234*l.*, for one quarter's water rate on the said premises from January 1 to March 31, 1911. (3.) Further or other relief.

2. This action is brought to have it determined what is the rateable value on which the water rate of the premises occupied by the defendant and known as "The Brown Bear" is to be calculated for the quarter from October 1 to December 31, 1910.

3. The said premises were during the whole of the said quarter and of the preceding and succeeding quarters supplied with water by the plaintiffs under the provisions of the Metropolitan Water Board (Charges) Act, 1907 (hereinafter called "the Charges Act"), and under s. 8 thereof the payment therefor is to be made at a rate per annum which shall not exceed 5 per cent. of the rateable value of the house or building . . . . in respect of which the supply is required.

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4. By s. 13, sub-s. 1, of the Charges Act, it is provided as follows: "The rateable value of any house or building or part of a house or building for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues or (if there is no such list in force) by the last rate made for the relief of the poor or other rate in which such last-mentioned rate is included."

5. By s. 70 of the Waterworks Clauses Act, 1847 (which is incorporated with the Charges Act), it is provided that water rates shall be paid in advance by equal quarterly payments in England . . . . at Christmas Day, Lady Day, Midsummer Day, and Michaelmas Day, and by s. 15 of the Charges Act it is provided as follows: "Notwithstanding anything contained in section 70 of the Waterworks Clauses Act 1847 the quarterly days for payment of water rates to the Board shall be the 1st day of April the 1st day of July the 1st day of October and the 1st day of January in each year."

6. In the year 1908 the valuation list then in force in the parish of the city of London was altered by the making of a supplemental valuation list, in which the rateable value of the said premises was shewn at the sum of 400*l*. The rateable value of the said premises as shewn in any list made previously thereto is not material to this case. Such supplemental valuation list came into force on April 6, 1909, and the plaintiffs contend that it is upon the rateable value shewn therein for the said premises that the water rate for the quarter from October 1 to December 31, 1910, is to be calculated.

7. On or about June 2, 1910, the overseers of the parish of the city of London sent to the assessment committee, pursuant to the Valuation (Metropolis) Act, 1869, s. 47, a provisional list in which the said hereditaments were included at the reduced rateable value of 399*l*., and on June 23, 1910, the clerk of the assessment committee served upon the defendant, as the occupier of the said hereditaments, a copy of so much of the said provisional list as related to the said hereditaments. The said copy of the provisional list was accompanied by a notice specifying a day on or before which any objection to the said provisional list might be made.

8. Upon October 3, 1910, the assessment committee considered the said provisional list and reduced the rateable value of the said hereditaments to 234*l.*, thereafter returning the said list and a copy thereof, after being dated on that day and signed by their clerk, to the overseers in accordance with the provisions of s. 47 of the said Act of 1869.

9. By s. 43 of the Valuation (Metropolis) Act, 1869, it is provided as follows: "The valuation list as approved by the assessment committee, and, if altered on any appeal under this Act to any sessions or a superior Court, as so altered, shall come into force at the beginning of the year (commencing on the sixth of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned."

10. Sect. 47 of the said Act provides for the making of provisional lists in certain circumstances, and for the manner in which such lists are to be made. By sub-s. 3 it is provided that: "(3.) On the receipt of the list the clerk of the assessment committee shall serve . . . . on the occupier of any hereditament to which the list relates a copy of so much thereof as relates to that hereditament. Every copy shall be accompanied by a notice specifying a day . . . . on or before which any objection to the provisional list may be made . . . ." By sub-s. 7 it is provided that: "(7.) If no objection is made, then on the expiration of the time for making objections, or if an objection is made then as soon as the assessment committee have determined on the objection, the assessment committee shall cause a copy to be made of the provisional list, with any alteration made in it by the committee, and shall return the list and the copy thereof, after being dated and signed by their clerk, to the overseers." By sub-s. 8 it is provided that: "(8.) A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force." By sub-s. 10 it is provided that: "(10.) A provisional list, during the time that it is in force shall be deemed to form part of the valuation list for the time

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being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly . . . ."

11. On or about September 1, 1910, the defendant paid to the plaintiffs, in respect of the water rates on the said premises for the quarter from July 1 to September 30, 1910, the sum of 5*l.*, being at the rate of 5 per cent. upon a rateable value of 400*l.* If the Court holds that the said provisional list formed part of the valuation list in force at the commencement of the quarter from October 1 to December 31, 1910, within the meaning of s. 13 of the Charges Act, and that the water rate for that quarter is to be calculated upon a rateable value of 234*l.* instead of 400*l.*, the plaintiffs admit that the principle of such decision applies also to the previous quarter from July 1 to September 30, 1910, and that the defendant is entitled to credit for the sum of 2*l.* 1*s.* 6*d.*, being the difference in the amount of the water rate payable for the quarter if calculated on a rateable value of 234*l.* instead of 400*l.*

12. It is common ground between the parties that the water rate demandable from the defendant in respect of the quarter from January 1 to March 31, 1911, is to be calculated at the rate of 5 per centum per annum upon a rateable value of 234*l.*, and amounts to 2*l.* 18*s.* 6*d.*

13. The amount alleged by the plaintiffs to be due to them by the defendant is shewn in paragraph 2 of the indorsement of the writ of summons herein, set out in paragraph 1 hereof. The following statement shews the amount which the defendant alleges that he is liable to pay to the plaintiffs:—

Paid for water rate for the quarter from July 1 to September 30, 1910, at 5 per cent. per annum on a rateable value of 400*l.*	£5	0	0
Less amount due for that quarter at 5 per cent. per annum on a rateable value of 234*l.* . . .	2	18	6
Amount overpaid in respect of that quarter	£2	1	6

Water rate for the quarter from October 1 to December 31, 1910, at 5 per cent. per annum on a rateable value of 234*l.*	£2	18	6
Water rate for the quarter from January 1 to March 31, 1911, calculated on the same basis .	2	18	6
	5	17	0
Less amount overpaid as above . . .	2	1	6
Whole amount admitted by defendant to be due .	£3	15	6

The said amount of 3*l.* 15*s.* 6*d.* was tendered to the plaintiffs' collector by the defendant on December 29, 1910, and was again tendered to the plaintiffs' solicitor by the defendant's solicitor on his behalf on March 29, 1911. Such tender was on both occasions refused.

The question for the opinion of the Court is, whether upon the true construction of the Metropolitan Water Board (Charges) Act, 1907, and under the circumstances above set out, the water rate in respect of the said premises of the defendant for the quarter from October 1 to December 31, 1910, ought to be calculated upon the rateable value of the said premises appearing in the quinquennial valuation list, 1905, as altered by the supplemental valuation list made in the year 1908, but not as altered by the said provisional list, namely, 400*l.*, or whether the said rate for the said quarter ought to be calculated upon the rateable value appearing in the said quinquennial valuation list as altered, inter alia, by the said provisional list, namely, 234*l.*

If the Court shall be of opinion that the said water rate ought to be calculated on the rateable value of 400*l.*, then judgment is to be entered for the plaintiffs for the sum of 7*l.* 18*s.* 6*d.* with costs.

If the Court shall be of opinion that the said water rate ought to be calculated on the rateable value of 234*l.*, then judgment is to be entered for the plaintiffs for the sum of 3*l.* 15*s.* 6*d.*, the plaintiffs to pay the defendant's costs.

Parker J. held that the valuation list in force on October 1, 1910, was the supplemental list made in 1908, unaltered by the provisional list; and that the defendant was liable to pay the

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rate payable on that date assessed on the rateable value of 400*l.*

The defendant appealed.

Ryde, K.C., and *Konstam*, for the appellant. The rateable value of the "Brown Bear" on October 1, 1910, was 234*l.* as fixed by the provisional list which came into force on June 23 in that year, when notice of it was given to us. It is true that that list was not finally fixed by the assessment committee till October 3, 1910, but that was their fault. They had no power to increase our liability by their own delay. The question was sub judice on October 1, and as soon as the provisional list was made it related back under s. 47, sub-s. 8, of the Valuation (Metropolis) Act, 1869, and had operation from June 23. Sect. 13 of the Charges Act (set out in Michael and Will on Gas and Water, 6th ed. p. 684) adopts the scheme of the Water Rate Definition Act, 1885, which was passed to explain s. 68 of the Waterworks Clauses Act, 1847, and the Charges Act simply substitutes "rateable value" for "annual value." Where there is a bona fide dispute as to what is "rateable value" the respondents cannot sue for the rate until the dispute has been settled: *New River Co.* v. *Mather.* (1) By s. 47, sub-s. 7, if any objection is taken to a provisional list the dispute has to be settled by the assessment committee, and then, under the words "shall have operation" in sub-s. 8, which are equivalent to "shall come into force," the provisional list comes into force retrospectively, and in this case was in force on October 1, 1910. Provisional lists are intended to provide for a sudden change in value during the interval between two supplemental lists, such as in this case the new duty imposed on the "Brown Bear" by the Finance (1909–1910) Act, 1910: *Rex* v. *Shoreditch Assessment Committee.* (2) The learned judge has overlooked the last two lines of s. 43 of the Act of 1869, which provides that the duration of the lists shall be "subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." Under s. 13, sub-s. 2, of the Charges Act the respondents have to rely on s. 47 of the Act of 1869, and under

(1) (1875) L. R. 10 C. P. 442. (2) [1910] 2 K. B. 859.

sub-ss. 3 and 8 of that section the date when the provisional list came into force was June 23. This construction was not disputed in *Parrish* v. *Hackney Corporation*. (1) The illustrations of jurors and vestrymen are not relevant; their position is regulated by different Acts of Parliament.

Danckwerts, K.C., and *J. Goodland*, for the Water Board. The important question is the meaning of the words "in force" in s. 13, sub-s. 1, of the Charges Act. We submit that the judgment appealed from is right. It is like the case of the juror or the vestryman who must be qualified at the moment of his election; he is not disqualified by the retrospective operation of a provisional list. That operation is by s. 47, sub-ss. 9 and 10, of the Act of 1869 restricted in the case of current poor rate, which is payable on the valuation actually in force. The date in this case when the provisional list came into operation under sub-s. 8 was October 3, when it was finally approved by the committee; on October 1 there was no provisional list in existence. This mode of assessment is not unfair on the defendant, for if his rateable value is increased he gains by not having to pay the heavier water charge from the earlier period. The charge is not really a rate at all, but a payment for a commodity supplied. It is questionable whether s. 47, sub-s. 10, applies to it, as it appears to deal only with rates and taxes properly so called: *Badcock* v. *Hunt*. (2) [They also repeated the arguments advanced in the Court below.]

Ryde, K.C., in reply, referred to s. 6 of the Metropolis Management Act, 1855, and ss. 23 and 31 of the Local Government Act, 1894.

Cur. adv. vult.

July 10. The following written judgments were delivered:—

COZENS-HARDY M.R. The Metropolitan Water Board are entitled to payment for water at a rate per annum which is not to exceed 5 per cent. of the rateable value of the building in respect of which the supply is required, and by s. 13, sub-s. 1, of the Metropolitan Water Board (Charges) Act, 1907, "The rateable value of any house or building . . . . for the purposes of

(1) [1912] 1 K. B. 669. (2) (1888) 22 Q. B. D. 145.

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this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues or (if there is no such list in force) by the last rate made for the relief of the poor or other rate in which such last-mentioned rate is included." At first sight it seems that the language of this section is so clear that no difficulty can arise. But the provisions of the Valuation (Metropolis) Act, 1869, which is the relevant statute, require careful consideration. The scheme of the Act is as follows: A quinquennial valuation list is prepared by the overseers and sent to the assessment committee, who have power to hear objections and to revise the list, and provision is made for an appeal to the sessions against the valuation list. By s. 43 the valuation list as approved by the assessment committee, subject to any alteration on appeal, is to last for five years, subject to any alterations that may be made by any supplemental or provisional list. By s. 44 the rate may be levied notwithstanding an appeal, and provision is made for repayment or allowance of any excess or deficiency according to the result of the appeal. By s. 45 the valuation list for the time being in force is made conclusive evidence of the rateable value for the purpose of a great number of rates and taxes and for determining the qualification of jurymen, vestrymen, guardians, and other persons. By s. 46 provision is made for a supplemental list which is to come into force at the beginning of the year succeeding that in which it is made, and all the provisions applicable to the quinquennial valuation list, including the provisions for appeals, are applicable to the supplemental list. Then by s. 47 in the case of a change in the value of any hereditament whether by way of increase or reduction in the course of any year a provisional list may be made by the overseers, and such list is to go before the assessment committee, who may deal with any objections. There is, however, no appeal to the sessions from a provisional list, it being deemed apparently unnecessary, inasmuch as such provisional list is only to be in force for a portion of the year. By sub-s. 8 the provisional list is to have operation from the date of the service of a copy of the list and notice on the occupier and is to continue in force until the first list, supplemental or other, which is subsequently made,

comes into force. By sub-s. 9 the overseers, upon a provisional list coming into operation, are to make entries in the rate-book for the then current poor rate, but this sub-section does not apply to any other rate. By sub-s. 10 a provisional list during the time it is in force is to be deemed to form part of the valuation list for the time being in force.

On October 1, 1910, a supplemental list made in 1908 had not been altered, and the "Brown Bear" was rated at 400*l.*, but a provisional list was on October 3 made which reduced the rateable value to 234*l.*, and when made it related back to June 23. The question before us is, what was the valuation list in force on October 1? On the one hand it is said that on October 1 it was the supplemental list unaltered which alone was in force. On the other hand it is said that the provisional list forms part of the valuation list for the time being in force, having regard to the restrospective effect given to the provisional list. Parker J. held that the former view is correct, and I agree with his judgment. When it is remembered that the water rate is payable in advance on the first day of the quarter, it seems to me to follow that it must be possible on that day to ascertain the amount payable, and that it cannot be reasonably held that the obligation of the consumer depends on the subsequent action of the assessment committee. It is not easy to say how the Water Board can estimate the amount of the rate (not exceeding 5 per cent.) which they require unless they know the total amount of the rateable value of the property supplied with water. The provisions of s. 45 as to qualifications seem to tend to the same conclusion. I am also pressed by the consideration that there is no provision for refunding any amount overpaid before the provisional list has been made, or on the other hand for requiring a further payment where the rateable value is increased by the provisional list. Upon the whole I think that Parker J.'s decision is correct, and that this appeal should be dismissed, but as my colleagues take a different view the appeal will be allowed.

Farwell L.J. The Valuation (Metropolis) Act, 1869, provides for three valuation lists—(1.) the quinquennial, (2.) the

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supplemental, and (3.) the provisional. The quinquennial lasts for five years "subject to any alteration that may be made by any supplemental or provisional list" (s. 43). We are not concerned in this case with the supplemental list. The provisional list is made only in cases of changes in the course of a year and is necessarily temporary and lasts only until the next list, whether supplemental or quinquennial, comes into force at the end of the current year. Having regard to the time that may elapse by reason of the fourteen days specified in s. 47, sub-s. 3, and of the appeal to the assessment committee which is allowed, the alterations in the provisional list might be absolutely nugatory if they had not a retrospective effect. An assessment committee might render the Act a dead letter by merely delaying their decision. Sub-s. 8 of s. 47 accordingly provides: "A provisional list, signed as aforesaid, shall have operation from the date of the service by the clerk of the assessment committee of a copy of the list and notice on the occupier, and shall continue in force until the first list (supplemental or other) which is subsequently made comes into force." I cannot adopt Parker J.'s reading of this and the following sub-sections. "Have operation" and "come into force" are interchangeable terms, as is apparent from sub-s. 8 itself, for the provisional list cannot continue in force unless and until it has come into force. It is plain that much reliance cannot be placed on the exact words used, for sub-s. 9 provides that upon a provisional list coming into operation the overseers shall enter in the rate-book the date at which such list is to come into operation. The object of s. 47 is to substitute the new value for the old as from the date of service specified in sub-s. 3, in this case June 23, and this then becomes as from that date the true valuation list as provided by s. 43 and s. 44. Sub-ss. 9 and 10 of s. 47 merely provide the machinery for giving effect to the alterations from the antecedent date in the rates and taxes to which the Act refers, which do not include water rate. The result is that at the beginning of any current year of rating there is no valuation list that can be regarded as indefeasibly and unalterably in force. It is open to variation by the retrospective action of s. 47.

This being so, what is the meaning of "the valuation list in

force at the commencement of the quarter for which the water rate accrues" in s. 13 of the Metropolitan Water Board (Charges) Act, 1907? Is it a sum ascertained merely by referring to the valuation list as appearing on that date, or is it the valuation list which is really and legally in force by virtue of the retrospective provisions in s. 47 of the Valuation (Metropolis) Act, 1869? Now the water rate is assessed on rateable value; the Board have the advantage of being authorized to demand payment in advance, but this ought not to entitle them to retain a larger sum than was in truth due to them as shewn by the subsequent order of the rating authorities. This is not only fair and just, but is in accordance with the words of the Water Rate Definition Act, 1885, mentioned in the last paragraph of this s. 13. The rateable value is "as settled from time to time by the local authority as duly constituted." The rate has been in this case so settled by relation back that on October 1 the rate as settled on October 3 became that latter amount by relation back. If this is not so, the provisional list is excluded from the operation of s. 13, and the words in the Act of 1885 must be read with the addition "as settled from time to time by quinquennial or supplemental but not provisional list." I cannot bring myself to think that this is the true construction of the Act, and I therefore think that the appeal must be allowed.

Kennedy L.J. In this case the defendant, the occupier of premises in Aldersgate Street, London, has been sued for water rate alleged to be due according to the joint effect of the Valuation (Metropolis) Act, 1869, and the Metropolitan Water Board (Charges) Act, 1907, and the Waterworks Clauses Act, 1847, which is incorporated in the last-mentioned Act.

The action was commenced on April 27, 1911; the rate claimed is the rate which fell due on October 1, 1910. The details of fact and the sections of the statutes appear in the special case. Shortly stated, the question is whether the defendant was, at the date of the commencement of this action, liable to pay the water rate on a valuation of 400*l.*, which was the valuation contained in the supplemental valuation list which came into force on April 6, 1909, or only on the corrected

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valuation of 234*l.* according to the valuation list (called the "provisional list") which was settled by the assessment committee on October 3, 1910, under the provisions of s. 47 of the Metropolis (Valuation) Act, 1869, but which, it is agreed, by virtue of s. 47, sub-ss. 8 and 9, had operation from June 23, 1910, and should "continue in force," in the words of the section, until April 6, 1911, when a new supplemental list would come into being. By s. 47, sub-s. 10, of the Valuation (Metropolis) Act, 1869, it is further enacted that the "provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly." Is the appellant bound, as the respondents assert, to pay on the valuation appearing in the supplemental list of April 6, 1909, as being the list "in force at the commencement of the quarter," i.e., October 1, 1910, or on the provisional list, which, though, as I have already said, not settled until October 3, 1910, yet, for some purposes, at any rate, as I understand Parker J. himself to hold (1), had, under s. 47 of the Valuation (Metropolis) Act, 1869, a retrospective operation as from June 23, 1910? I feel myself, and, indeed, the difference of judicial opinion in this Court shews, that the question is one of considerable difficulty. Parker J. in the Court below has felt himself obliged to hold that the list in force referred to in the Charges Act, 1907, s. 13, sub-s. 1, so far as concerns the valuation of the appellant's premises on which he is to be charged with water rate on October 1, 1910, is the old supplemental list which came into force on April 6, 1909, and is not the provisional list which rectified that supplemental list in regard to the valuation of the appellant's premises as settled by the assessment committee on October 3, 1910. I have used the words "obliged to hold" because undoubtedly a serious hardship, if this decision is right, is inflicted upon the ratepayer,

(1) [1912] 1 Ch. 317.

Mr. Phillips, the appellant in the present case. His just rateable value on October 1, 1910, according to the determination of the assessment committee, when they, on his appeal under the procedure provided by s. 47 of the Valuation (Metropolis) Act, 1869, settled the provisional valuation list, was only 234*l.* Nevertheless, if Parker J.'s decision stands, he will be actually obliged to pay water rate on a valuation of 400*l.*, and this because the assessment committee, for some reason which is not explained, did not give their determination as to Mr. Phillips' valuation (which had been before them since early in June) until after October 1, the date at which the water rate for the last quarter of 1910 became due in advance under the provisions of the 15th section of the Charges Act, 1907. In construing the joint effect of these two statutes, the Charges Act, 1907, and the Valuation (Metropolis) Act, 1869, one is naturally reluctant to adopt an interpretation which would result in an apparent injustice of this sort, although, of course, it is a duty to do so, unless the language of those statutes permits an alternative interpretation.

I have had the opportunity of reading and considering the judgment on this appeal which has been prepared by Farwell L.J., and I concur in it. In regard to the provisions of s. 47 of the Valuation (Metropolis) Act, 1869, with which Farwell L.J. has dealt, I desire only to point out two things. The first is a matter of no great importance. Parker J. has, I think, in reference to sub-s. 9 in one respect not quite correctly appreciated the terms of the enactment. In the report of the judgment of the learned judge (1), it appears that he has read the words of the sub-section as requiring an alteration by the overseers of the valuation list after it has been settled and determined by the assessment committee. That is not so. The alteration of the valuation by the assessment committee is, so far as regards the valuation list, as I read the section, a final and complete alteration. According to the express terms of s. 47, sub-s. 10, all that the overseers have thereafter to do is to make such entries in the rate-book for the then current poor rate as will bring the same into conformity with the amended valuation list. The second

(1) [1912] 1 Ch. 314, 318.

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matter to which I would call attention is this: If it can be urged that the view adopted by Parker J. gives to the words "valuation list in force" as they stand in the Charges Act, 1907, that which is prima facie their natural effect, it is, at least, equally true that that view does not give their prima facie natural effect to the words "shall have operation," and "continue in force," in the Valuation (Metropolis) Act, 1869: it being agreed that the date referred to in the statute, s. 47, sub-ss. 8, 9, and 10, is in this case June 23, 1910, and, if a choice between two constructions, each of which involves an objection, has to be made, that construction, in my judgment, ought to be preferred which is, at any rate, free from involving an irremediable hardship.

Whilst adopting, as I have said, the judgment of Farwell L.J., I venture to think that the same conclusion may be reached by another legitimate route. The Charges Act, 1907, s. 13, sub-s. 1, speaks of the rateable value upon which the water rate is assessed as a rateable value which shall be determined by the valuation list "in force" at the commencement of the quarter for which the water rate accrues, or (if there is no such list in force) by the last rate made for the relief of the poor, or other rate in which such rate is included. Leaving out of sight the express provisions of s. 47 of the Valuation (Metropolis) Act, 1869, in regard to the date of the commencement of the operation of the amended valuation, I am inclined to think that the supplemental valuation list of April 6, 1909, upon which the claim of the respondents is founded, ought not to be treated, so far as regards the appellant, as being within the meaning of the Charges Act, 1907, s. 13, sub-s. 1, "in force" on October 1, 1910. A provisional list in regard to the appellant's valuation had been prepared in the preceding June, and was still under the consideration of the assessing authority on October 1. In a sense, no doubt, that is, generally, the supplemental list was a list in force; but ought we to hold that the Legislature intended to treat a particular valuation as in force which was in fact, at the time, sub judice? Some light, I think, is thrown upon this point if we refer to ss. 43 and 44 of the Valuation (Metropolis) Act, 1869. In s. 43, in regard to the original, that is, the first, quinquennial, valuation list, it was provided that it shall "come into

force" at the beginning of each year succeeding that in which it is made. But s. 44 shews that the Legislature deemed it necessary to provide against an injustice arising from this enactment similar to that which would apparently arise in the present case if the judgment appealed from is correct. So, in s. 44, in regard to any appeal against a valuation which might be pending at the commencement of the year, the Legislature proceeded straightway to enact that, whilst the valuation list shall "come into force" unaltered, notwithstanding a pending appeal, yet at the same time that if on appeal in any case the valuation is reduced, the difference, if too much has been paid by the ratepayer, shall be allowed or repaid to him. Sect. 46, sub-s. 3, I may add, appears to place the supplemental list on the same basis. There do not appear to be any similar provisions in regard to the provisional list, so as to give the right to an allowance or repayment to a ratepayer in paying upon a valuation contained in a quinquennial or a supplemental list, which is reduced by the assessment committee on the application of the ratepayer using the procedure provided by s. 47.

If Mr. Phillips is held bound to pay to the Water Board upon a valuation of 400*l.*, I can find no statutory provision, nor has any been shown by counsel, which will enable him to require an allowance or repayment of the difference between the amount of the rate charged upon that valuation and the amount of the rate chargeable upon the valuation of 234*l.* which has been determined to have been the valuation which ought to have appeared in the valuation list on October 1, 1910. The consideration of these sections appears to me to lend some support to the view that the Legislature, where it spoke in s. 13, sub-s. 1, of the Charges Act, 1907, of a valuation list "in force," ought not to be understood as intending to include any particular valuation in that list at the time under the review of the rating authority, whose decision, by statutory enactment under the Valuation (Metropolis) Act, 1869, s. 47, might have, as it has in the present case, a retrospective operation. Whether the consideration which I have stated is or is not independently sufficient to justify the interpretation of s. 13, sub-s. 1, of the Charges Act, 1907, which I have suggested, it does at any rate appear to me to go some way

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to support the view adopted by Farwell L.J. in which I have already expressed my concurrence. The fact that there is no provision for allowance or repayment in respect of a rate paid, as under the present circumstances, upon a valuation which was under the consideration of the assessment committee before the rate became due, and which, after the date of the rate becoming due, has been reduced by the assessment committee, affords a fair reason why the Legislature, in order to prevent a consequent injustice to the ratepayer, should enact in s. 47 of the Valuation (Metropolis) Act, 1869, that the provisional list, whenever signed by the committee, shall have operation from the date fixed by sub-s. 8, so as to have, in such a case as the present, a retrospective operation, and so as to afford in such a case as the present an answer to a demand of a rating authority which is based upon a valuation which the provisional list has corrected, although it has happened that the claim to the correction was still under the consideration of the assessment committee when the rate became payable.

For these reasons I think that this appeal should be allowed.

Appeal allowed.

Solicitors: *Maitlands, Peckham & Co.; Walter Moon.*

H. C. R.

PARKER J.

1912

July 26.

In re NATIONAL INSURANCE ACT, 1911.

In re EMPLOYMENT OF CHURCH OF ENGLAND CURATES.

Insurance—National—Church of England Curates—Employment—Contract of Service—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 1, *sub-ss.* 1, 3; *s.* 66, *sub-s.* 1 (iii.); *First Schedule, Part I.* (*a*).

In order to make insurance obligatory under Part I. of the National Insurance Act, 1911, there must be something in the nature of a contract of service.

The position of a curate in the Church of England, whether he is formally licensed by the bishop under seal or is a mere probationer under the bishop's temporary permission, is that of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract. Therefore the relation between the incumbent and the curate, or the bishop and the curate, is not the relation of employer and employed, and the curate is not compulsorily insurable under the Act.

Quære whether the curate, in either case, could come in under the Act as a voluntary contributor.

In this case the question was raised by motion, under s. 66, sub-s. 1 (iii.), of the National Insurance Act, 1911, whether the status of (1.) curates and (2.) assistant curates in the Church of England was "employment" within the meaning of Part I. of the Act.

The application was made, at the instance of the Insurance Commissioners, against the Rev. F. C. Davies, vicar of Reigate, the Rev. F. J. Cutts, his licensed curate, the Rev. A. M. Batty, vicar of West Hackney, and the Rev. R. E. Spencer, his probationary or unlicensed curate. The relation between an incumbent and his curates was, according to the evidence, as follows:—

(*a*) A stipendiary curate first obtains a nomination, called his "title," from an incumbent. They enter into an agreement by which the incumbent promises to pay a certain sum as stipend and the curate agrees to accept the whole sum and no less. The agreement is sent to and retained by the bishop, and he thereupon issues his licence to the curate to perform the office of stipendiary curate, and assigns to him the stipend agreed upon. The agreed stipend is a charge on the

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benefice. The bishop can, in certain cases, under the Pluralities Act, 1838, appoint curates and assign stipends to them, without nomination. Before that Act was passed curates were rarely licensed, but the Act directed that they should be licensed. According to the Canon Law, the bishop was responsible for the curate's maintenance if he ordained him without a sufficient "title." An incumbent cannot dismiss a stipendiary curate without first obtaining the bishop's permission, and the curate cannot resign without giving a certain previous notice to the bishop, and cannot, without the bishop's sanction, take on the duty of another cure.

The licence granted by the Bishop of Southwark, under his hand and episcopal seal, to Mr. Cutts was as follows: "Edward, by Divine Permission Bishop of Southwark, to our beloved in Christ Frederick James Cutts, B.A., Clerk, Greeting: We do by these presents give and grant to you—in whose fidelity, morals, learning, sound doctrine and diligence we do fully confide—our licence and authority to perform the office of stipendiary curate in the Parish Church of Reigate, in the County of Surrey, within our diocese and jurisdiction, in preaching the Word of God, and in reading the Common Prayers and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer made and published by authority of Parliament, and the Canons and Constitutions in that behalf lawfully established and promulgated, and not otherwise or in any other manner. And we do by these presents assign unto you the yearly stipend of 150*l.*, to be paid quarterly, for serving the said cure. And we require you to reside in the said parish."

(*b*) As regarded "unlicensed curates," namely, those working under temporary permission to officiate, the evidence shewed that some eight or nine years ago the bishops agreed not to issue a licence until a curate had worked for a probationary period in a parish; that the permission issued for that period was in effect only a promise by the bishop that he would not inhibit the clergyman; that it did not give the curate the status of an assistant stipendiary curate contemplated by the Pluralities Act, 1838; that his stipend was not a legal charge on the benefice; and

that the incumbent could, without any reference to the bishop, dismiss the curate at pleasure. The permission to Mr. Spencer was signed by the Bishop of Stepney and was in the following form :— "The Rev. R. E. Spencer has permission to work in the Parish of West Hackney for three months, giving his whole time to the work, at a stipend."

Each of the two curates received a stipend of less than 160*l.* per annum.

Sargant (*Sir Rufus Isaacs, A.-G.*, with him), for the Insurance Commissioners. By s. 1, sub-s. 1, of the National Insurance Act, 1911, subject to the provisions of the Act, all persons aged sixteen and upwards "who are employed" within the meaning of Part I. of the Act "shall be, and any such persons who are not so employed but who possess the qualifications hereinafter mentioned may be, insured" in manner provided in Part I., "and all persons so insured (in this Act called 'insured persons') shall be entitled in the manner and subject to the conditions provided in this Act to the benefits in respect of health insurance and prevention of sickness conferred" by Part I. By s. 1, sub-s. 3, "the persons not employed within the meaning of" Part I. "who are entitled to be insured persons include all persons who . . . . are engaged in some regular occupation and are wholly or mainly dependent for their livelihood on the earnings derived by them from that occupation . . . . and the persons possessing such qualifications who become or continue to be insured persons are in this Act referred to as voluntary contributors: Provided always that no person whose total income from all sources exceeds 160*l.* a year shall be entitled to be a voluntary contributor unless he has been insured under" Part I. for five years or upwards. By s. 1, sub-s. 2, the persons employed within the meaning of Part I. of the Act—"employed contributors"—include all persons of either sex engaged in any of the employments specified in Part I. of the First Schedule to the Act. These include (First Schedule, Part I. (*a*)) "Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers,

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and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship, without any money payment." The schedule, Part I. (*c*), also includes employment as an "outworker," which term it defines.

Sect. 75 of the Pluralities Act, 1838 (1 & 2 Vict. c. 106), empowers the bishop, in the case of non-resident incumbents and in other cases, "to appoint and license a proper curate, with such salary as is by this Act allowed and directed, to serve the church or chapel of the benefice in respect of which such neglect or default shall have occurred." Sect. 76 of the same Act leaves it to the bishop to say where the residence of the curate is to be. And in cases where the ecclesiastical duties of a benefice are inadequately performed, the bishop is empowered in certain cases (s. 77) "to appoint and license a curate or curates, as the case shall appear to him to require, with such stipend or stipends as he shall think fit to appoint," not exceeding certain amounts. Then by s. 83 the bishop is authorized and required to appoint a stipend to every curate of a non-resident incumbent, and the licence of a stipendiary curate must specify the amount of the stipend; and the bishop has jurisdiction in cases of differences as to the stipend, and may enforce payment of it by monition, and by sequestration of the profits of the benefice. By s. 95, except where the benefice has become vacant, the incumbent must obtain the permission of the bishop to require a licensed curate to give up his curacy on six months' notice. By s. 98 the bishop is empowered to license curates employed without nomination, to revoke licences, and to remove curates for any cause which appears good and reasonable.

By s. 13 of the Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), the bishop may, in the cases of benefices beyond a certain annual value, and with a large population or a second church or chapel, require the clergyman to nominate a fit and proper person to be licensed as a curate and to be paid by the clergyman, and on failure of such nomination the bishop may appoint and license a curate with a stipend not exceeding 150*l*. "Employment" is a very wide term and may apply although there is no permanent relation of master and servant between the

employer and employed: *Sadler* v. *Henlock*. (1) The Commissioners do not desire the case to be argued on their behalf, but merely wish to obtain the decision of the Court. [He also referred to *In re Employment of Ministers of the United Methodist Church* (2); *Yewens* v. *Noakes* (3); *Simmons* v. *Heath Laundry Co.* (4)]

Romer, K.C., and *Austen-Cartmell*, for the vicar of Reigate and his licensed curate. A licensed curate is only within the compulsory provisions of the Act of 1911 if he comes under the First Schedule, Part I. (*a*). The term "contract of service" in that paragraph is to some extent explained by paragraph (*c*), which shews that the Legislature did not intend to class an outworker as being under a "contract of service." That expression was considered by the Court of Appeal in *Simmons* v. *Heath Laundry Co.* (4) The question seems to be whether the curate is the servant of the incumbent. It is submitted that he is not. An incumbent does not employ a curate. The bishop appoints him and, as the form of licence shews, assigns the yearly stipend for serving the cure. The curate only renders assistance to the incumbent in the performance of his duties to the parish. The case of this particular curate is under the Pluralities Act, 1838; but outside that Act a vicar nominates a person to the bishop to be licensed as a curate: Blunt's Book of Church Law, 9th ed. pp. 216—218.

Prior to the passing of the Pluralities Act, 1838, a licence was necessary under Canon 48 of the Canons of 1603. Only s. 77 and s. 78 (now repealed) of the Act of 1838 applied in the case of resident incumbents, but the machinery of the Act has been applied to cases under Canon 48.

In *Baddeley's Case* (5) (heard in 1872) it was held that s. 96 of the Act of 1838 applied to curates both of resident and non-resident incumbents: Phillimore's Ecclesiastical Law, 2nd ed. p. 439. The Act of 1838 is now applied generally to the licensing of curates, and gives the curate a legal status as an office holder and secures the fixity of his tenure. Sect. 95 of

(1) (1855) 4 E. & B. 570.
(2) (1912) 28 Times L. R. 539.
(3) (1880) 6 Q. B. D. 530.
(4) [1910] 1 K. B. 543.
(5) Apparently not reported.

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that Act shews how the curate can be made to quit and give up his curacy. The incumbent is not the master, and the curate is not his servant, but divides with him a sphere of ecclesiastical labour, and is subordinate to the incumbent as the incumbent is subordinate to the bishop.

F. H. L. Errington, for the vicar of West Hackney. A curacy is a spiritual office: Burn's Ecclesiastical Law, 9th ed. vol. ii. p. 54, sub-title Curates. The nature of that office is shewn by the Ordination Service in the Book of Common Prayer. The curate in this case is working under an episcopal licence granted for three months, but it is a licence although it is less formal than the one granted under the seal of the Bishop of Southwark. Neither of the curates in this case is the servant of his vicar.

J. W. Manning, for Mr. Spencer, the probationary curate. The Act of 1911 applies to this case. Here the vicar employs and pays the curate. Without any permission from the bishop, the vicar can dismiss the curate and the curate can quit the vicar's service. The relation of master and servant does not necessarily involve the performance of menial services, and the fact that the duties are spiritual is immaterial. The relation between an incumbent and his curate is very like that between a medical man and his assistant or a solicitor and his clerk.

[PARKER J. A curate does not obey his vicar because he has contracted to do so.]

The vicar has control over his curate and can forbid him to preach or to do any other work incidental to his usual duties.

PARKER J. It appears quite clear on the construction of the Act that, in order to make insurance obligatory under Part I., there must be something in the nature of a contract of service, and in the particular case before me, unless I can say that there exists between a curate and some one else some contract which can properly be called a contract of service, the curate can in no case be a person on whom insurance is obligatory, though he may possibly come in as a voluntary contributor.

I have come to the conclusion that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by

contract at all. It appears to me that there can be no pretence in reality for arguing that the relation between him and his vicar, or between him and his bishop, or between him and any one else, is the relation of employer and servant. As I understand, nobody can assume the office of curate, or can fulfil the duties ordinarily exercised by curates in a parish, without the consent or licence of the bishop. If a stipendiary curate is to be appointed, this may in some cases be done, as in the absence of the vicar or if the vicar is not carrying out his duties properly, by the bishop on his own initiative. If, on the other hand, the vicar requires assistance, it is open to him to ask the bishop to license his nominee for the purpose of assisting him. But in neither the one case nor the other do I think it can properly be said that the vicar appoints the curate. He nominates him, and, if the appointment is made at all, it is made by the bishop and is contained in the bishop's licence.

Again, it appears to me that, at any rate in the case of those curates who hold a full licence from the bishop, it is impossible to say, with any real accuracy, that they can be dismissed at the will of the vicar. They can only be dismissed with the consent of the bishop, and, as I gather, for some reasonable ground—either that their services are no longer required, or, possibly, that there has been some misconduct or deficiency on their part which would justify their dismissal; but in every case the bishop must consent. Similarly, if the curate himself wants to resign, I doubt whether he can resign without the consent of the bishop. Certainly he cannot do so without giving a certain amount of notice in that behalf to the bishop.

Further, when I come to consider the duties of the curate, it appears to me that those duties are in no way defined by any contract of employment between him and any one else. He owes, no doubt, a certain amount of obedience to the vicar, as to the precise extent of which there may be some question—at any rate into that part of the case I do not intend to enter at any length—but the duty which he owes to the vicar is not a duty which he owes because of contract, but a duty which he owes to an ecclesiastical superior. He may owe one kind of duty to the bishop and another kind of duty to the vicar, and one may have

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greater control over his actions than the other, but whatever authority either exercises over him is an authority which can be exercised by virtue of the ecclesiastical jurisdiction, and not an authority which depends in any case upon contract. If I were to hold that the vicar and his curate were in the position of master and servant, I might be imposing on the vicar at common law very serious liabilities, from which I think, in all common sense, he ought to be exempt.

It appears to me, therefore, that if I test the question, as to whether there is a contract of service, by any of the three methods suggested—the appointment, the power of dismissal, and the duty owed by curate to vicar—there is no such contract of service as the Act seems to contemplate.

With regard to the distinction between a fully licensed curate and a curate who only holds the consent of the bishop for the temporary period of three months as a kind of probationer,—from the point of view of Canon Law, it appears to me that that consent of the bishop is in effect a licence for the purpose of the canon. It seems, according to the evidence before me, that, where that consent is given, and no full licence is given, it is competent to the vicar to dismiss the curate without the consent of or without any reference to the bishop. Otherwise it seems to me that a curate who is licensed by that temporary consent is in exactly the same position with regard to the duties he has to perform as any stipendiary curate who has the full consent. I do not think that this slight distinction is sufficient to justify me in holding that, whereas the stipendiary curate who is fully licensed is not within the section of the Act, a curate who holds a temporary licence is.

I think, therefore, that neither of the classes of curates mentioned in the notice of motion are persons who must be insured, although both of them could probably come in, if they chose, as voluntary contributors.

Solicitors: *The Treasury Solicitor; Light & Fulton; Paterson, Candler & Sykes.*

F. E.

WILL *v.* UNITED LANKAT PLANTATIONS COMPANY, LIMITED.

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[1910 W. 1898.]

June 28, 29; *July* 1.

Company—Preference Shares—Distribution of Profits—Priority—Ordinary Shares—Rights of Shareholders inter se.

Where preference shares are given a fixed preferential dividend at a specified rate the right of the holders of such shares to take any further dividend is impliedly negatived.

A company which had power under its articles to issue new shares upon such terms including preference as the company might direct passed a resolution that the capital of the company be increased by the issue of certain new shares to be called preference shares, and the holders thereof to be entitled to cumulative preferential dividends at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares, and that such preference shares should rank, both as regards capital and dividend, in priority to the other shares.

Preference shares were issued in accordance with this resolution.

The articles further provided that, subject to any priorities that might be given upon the issue of any new shares, the profits of the company available for distribution should be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively :—

Held, that in the distribution of profits holders of the preference shares were not entitled to anything more than a 10 per cent. dividend.

Decision of Joyce J. reversed.

This was an appeal by the defendants from a decision of Joyce J.

The plaintiff brought the action against the company, on behalf of himself and all other holders of preference shares in the company, claiming a declaration that a special resolution of the company passed and confirmed at meetings held on June 23 and July 8, 1909, was invalid, illegal, or ineffectual, so far at any rate as the same purported to affect the rights and interests attaching to the preference shares of the company, and that the preference shares were entitled to rank for dividend pari passu with the ordinary shares as against any profits of the company available for distribution as dividend after providing for a cumulative dividend of 10 per cent. on the preference shares and a dividend of 10 per cent. on the ordinary shares.

The company was incorporated in 1889.

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Clause 5 of the memorandum of association was as follows: "The capital of the company is 400,000*l.* divided into 400,000 shares of 1*l.* each, with power to increase. The shares forming the capital (original or increased) of the company may be divided into such classes with such preferences and other special incidents and be held on such terms as may be provided by the articles of association and regulations of the company for the time being."

The articles provided (inter alia) as follows:—

"42. The board may, with the sanction of a general meeting of the company, from time to time increase the capital of the company by the issue of new shares.

"43. Such new shares shall be of such amount, and shall be issued for such consideration, on such terms and conditions, and [subject to the provisions hereinafter contained as to the consent of the holders of any class of shares, where such consent is necessary] with such preference or priority as regards dividends or in the distribution of assets, or as to voting or otherwise over other shares of any class, whether then already issued or not, or as shares to be deferred to any other shares with regard to dividends or in the distribution of assets, as the company in general meeting may direct, and subject to, or in default of any such direction, the provisions of these articles shall apply to the new capital in the same manner in all respects as to the original capital of the company."

"115. Subject to any priorities that may be given upon the issue of any new shares, the profits of the company available for distribution (having regard to the provisions hereinbefore contained as to a reserve fund) shall be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively."

On July 13, 1891, an extraordinary general meeting of the company was held at which the following resolutions were passed:—"(1.) That the capital of the company be increased to 450,000*l.* by the creation of 50,000 new shares of 1*l.* each; (2.) that the new shares be called preference shares, and that the holders thereof be entitled to a cumulative preferential dividend at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares; and that such

preference shares rank, both as regards capital and dividend, in priority to the other shares."

Subsequently 20,000 preference shares were issued, of which the plaintiff was the holder of 419. He was also the holder of ordinary shares. By the above-mentioned resolution, which was passed and confirmed at meetings held respectively on June 23 and July 8, 1909, new articles of association were approved of. Of these new articles No. 4 was as follows:—

"In the event of the winding up of the company the surplus assets shall be applied first in payment to the holders of the preference shares of the amounts paid up on such shares together with a sum equivalent to any arrears of dividends, whether declared or undeclared, down to the commencement of the winding up; secondly, in payment to the holders of the ordinary shares of the amounts paid up on such shares, and, subject thereto, shall be divided among the members in accordance with the amounts for the time being paid on the shares held by them respectively other than amounts paid in advance of calls. In the event of capital being written off on a reduction of capital, amounts paid or credited on the ordinary shares shall be written off before the amounts paid or credited on the preference shares."

Article 115 of the original articles was replaced by article 111 of the new, which provided as follows:—

"Subject to any priorities that may be given upon the issue of any new shares, or may for the time being be subsisting, the profits of the company available for distribution shall be applied first in payment of a cumulative dividend at the rate of 10 per cent. per annum upon the amounts paid on the original preference shares of the company, and subject thereto shall be distributed as dividend among the holders of the ordinary shares in accordance with the amounts for the time being paid on the ordinary shares held by them respectively, other than amounts paid in advance of calls."

In the circular accompanying the notice of the meetings and issued to the shareholders it was stated that the proposed new articles were merely variations of and additions to the original articles necessitated by the alterations in company law since the

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incorporation of the company, and did not materially affect the rights of the shareholders or alter in any way the rights of the preference shareholders.

It appeared that the preference shareholders had never received more than a dividend of 10 per cent., but much larger dividends had been declared and paid upon the ordinary shares.

Joyce J. held that the question of the distribution of the surplus profits of the company depended upon the resolution of July 13, 1891, read in connection with the original articles and in particular article 115 thereof. Upon that view the preference shareholders were entitled in priority to a cumulative dividend of 10 per cent., and subject to that the profits were to be divided equally between the members. The result was that the preference shareholders were to receive a cumulative dividend of 10 per cent.; then the ordinary shareholders were to be paid a dividend of 10 per cent., and the surplus profits were to be paid equally to all the members of the company. He accordingly declared that the new articles were invalid and that any future distribution of surplus profits must be made upon the footing above stated.

From this decision the defendants appealed.

Upjohn, K.C., Gore-Browne, K.C., and *H. E. Wright*, for the appellants. The rights of the preference shareholders are prescribed by the resolution of July 13, 1891, under which the preference shares were issued. Upon the true construction of that resolution the preference shareholders are entitled to a preferential dividend of 10 per cent. and nothing more. Joyce J. was wrong in reading the resolution with article 115: *Birch* v. *Cropper*. (1) The question in that case was as to capital. But in the House of Lords Lord Herschell and Lord Macnaghten both dealt with the rights of preference shareholders as to dividend.

It is not material to consider the question with reference to capital which was dealt with in *In re Espuela Land and Cattle Co.* (2) The construction adopted by Joyce J. leads to all sorts of difficulties. It involves a wholly fantastical distribution of profits. The only relevant document is the resolution, and the

(1) (1889) 14 App. Cas. 525. (2) [1909] 2 Ch. 187.

meaning of that by itself is plain. [They also referred to Palmer's Company Precedents, 11th ed. pt. i. pp. 578, 579.]

Younger, K.C., and *Tomlin*, for the respondent. The judgment appealed from is in accordance both with principle and authority. According to the construction of the resolutions passed on July 13, 1891, read with the articles, the preference shareholders are entitled to a dividend of 10 per cent. Subject to that the ordinary shareholders are entitled to 10 per cent., and after that the profits are to be divided among both classes of shareholders in proportion to the amount paid up on the shares. As to capital *In re Espuela Land and Cattle Co.* (1) is an express decision, and the same principle should be applied as to dividends. Except to the extent to which inequality is introduced by the articles the principle of division both as to capital and dividends is equality: Buckley on Companies, 9th ed. p. 650. The ordinary shareholders here may be said to be in a position of subordinate equality. Prima facie under the general law and under the articles there is a position of equality. In *Guinness* v. *Land Corporation of Ireland* (2) Cotton L.J. said: "But in reality it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary." It must be shewn that the contract has so provided. A variation in priority has in this case been introduced by the resolution, but subject to that the principle of equality should still be observed. The point in this case was not touched in *Birch* v. *Cropper*. (3)

[COZENS-HARDY M.R. The dicta of Lord Macnaghten and Lord Herschell in that case are not to be disregarded.]

Upjohn, K.C., in reply.

Cur. adv. vult.

July 1. COZENS-HARDY M.R. This is an appeal from a decision of Joyce J., and it raises a question as to the right of preference shareholders, a question the decision of which may, and indeed I think must, have very far-reaching effects, if the judgment of

(1) [1909] 2 Ch. 187. (2) (1882) 22 Ch. D. 349, 377.
(3) 14 App. Cas. 525.

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Joyce J. is to be supported. The company in question is a limited company. It had power by its articles to issue new shares upon different terms, including preference. That is found in article 43. The company did, in 1891, issue certain new shares. The validity of that issue is not for the moment in question; but the dispute between the parties is this. The company, I gather, is in a position not merely to pay the preferential dividend, but to pay other dividends to the amount of 10 per cent. to the ordinary shareholders, and the question is whether the preference shareholders are or are not entitled to a further dividend after the ordinary shareholders have had a dividend equal to 10 per cent. That depends, in my opinion, upon the terms of the issue, looking, of course, at the articles of association, so far as they are applicable, and can fairly be held not to have been excluded. The resolution in question is this: "The capital of the company to be increased to 450,000*l.* by the creation of 50,000 new shares of 1*l.* each, the new shares to be called preference shares, and the holders thereof to be entitled to cumulative preferential dividends at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares; and that such preference shares rank, both as regards capital and dividend, in priority to the other shares." Now what is the ordinary prima facie meaning of preference shares having a fixed dividend, fixed in this sense, that it does not vary with the profits of the year, but is a fixed dividend of 10 per cent. per annum? It seems to me that the ordinary meaning is that that resolution defines and limits the dividend which a preference shareholder can take. I accept and adopt the observations of a living writer, whose experience in this matter is very great. Sir Francis Palmer in his book, Palmer's Company Precedents, 11th ed. pt. i. p. 814, says this: "It is generally assumed that where the preference shares are given a fixed preferential dividend at a specified rate, that impliedly negatives any right to take any further dividend, and probably this assumption is well founded." In my opinion, that assumption is well founded. It is remarkable that although preference shares have been well known for so many years, and it is more than half a century since the very

important decision of *Henry* v. *Great Northern Ry. Co.* (1) was delivered by the Court of Appeal, although during all those years preference shares or preference stock, which is the same thing, have been well known and dealt with in millions, not an instance has been called to our attention in which the claim now set up has ever been put forward. There are, I think, weighty dicta—I admit they are only dicta—adverse to the argument of the respondent. The dicta I refer to are in the case of *Birch* v. *Cropper*. (2) There the preference shares were issued on these terms: "The new shares to entitle the holders thereof to a dividend after the rate of 5 per cent. per annum upon the amount for the time being called up thereon, and taking precedence of and priority over all dividends and claims of the holders of the ordinary shares of the company." It was held by North J., again I repeat only by way of dictum, for it was not the decision in the case, that the preference shareholders there were only entitled to the fixed 5 per cent. dividend. I cannot, with the greatest possible respect, altogether follow the course of reasoning by which he arrived at that view, but when the case of *Birch* v. *Cropper* (3) came before the House of Lords, Lord Herschell said this: "The appellant's argument appears to assume that the preference shareholders are not entitled to any share of the profits of the company. I do not think this is the case. What they are to receive is indeed limited in its amount, but it is none the less a share in the profits." So I say here the effect of this resolution is that the shares were to be issued entitling the preference shareholders to a fixed cumulative dividend of 10 per cent., but to no further right or interest in the profits.

But then it is said that the matter ought to be approached in a different way. You ought to see what, according to the true construction of the articles, is prima facie the right of all the shareholders in the company; and if you find that all the members of the company are entitled rateably to share in the profits of the company, you ought not to cut down the rights of the preference shareholders except so far as you find something

(1) (1857) 1 De G. & J. 606.
(2) (1888) 39 Ch. D. 1; 14 App. Cas. 525.
(3) 14 App. Cas. 531.

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equivalent to a negative of their right to any further share in the profits. I do not assent to that view. I think the true construction of the resolution is that which I have indicated, and that there is nothing in article 115 or in article 43 which justifies us in coming to any other conclusion. In other words, I think that although on any matter as to which the resolution is silent the articles do prevail, such, for instance, as the right of voting or the right to surplus on a winding-up, in such cases, no doubt, the articles will prevail; but when you find a resolution which, according to its true construction, contemplates, and only contemplates, a fixed dividend, it is really exclusive of article 43 and article 115, in the sense in which those articles are relied upon by the present respondent.

I have said that, so far as I am aware, and so far as counsel have been able to assist us, this contention has never before been raised in argument in the Court; but in the modern precedents, in Sir Francis Palmer's book, we find that, in order to avoid any doubt or question, negative words are introduced in one form. Of course, that may be a very desirable thing to do, and if those words had been found here, it might have rendered unnecessary the arguments which have been addressed to us in this case. On the other hand a form may be adopted where it is desired, which will give the preference shareholders a further right, namely, the right not merely to a fixed dividend, but, after the ordinary shareholders have been put on the same level, to participate in a further dividend. Joyce J. has held that the preference shareholders are entitled to rank for dividend pari passu with the ordinary shareholders of the company out of the profits of the company available for distribution after providing for a cumulative preferential dividend of 10 per cent. per annum on the preference shares and also a dividend of 10 per cent. per annum on the ordinary shares. Mr. Younger has in his argument before us suggested that there is a sort of subordinate equality, and contended that the true way of construing this resolution is to say first of all the preference shareholders get 10 per cent., with arrears of course, and then the ordinary shareholders get 10 per cent., with arrears for any number of years, and then after that the preference and ordinary shares share alike. I am entirely

unable to support that view of this resolution. I think it would be altogether an unjust decision to arrive at, having regard to the terms of the resolution. One cannot be aware to any extent of what goes on on the Stock Exchange without knowing that preferential shares and stock are ordinarily spoken of and regarded, and I think properly regarded, as shares or stock which carry a fixed preferential dividend, and are not entitled to anything more. With great respect to the learned judge below I am unable to agree with his decision, and I think this appeal must be allowed.

FARWELL L.J. I am of the same opinion. It is true that we have to construe not the resolution standing by itself, but the resolution and the memorandum and articles taken together; but the fallacy of the ingenious argument of Mr. Younger and Mr. Tomlin is this. They treat shares as though they were born into the world, all equal; and as if preference was a kind of subsequent attachment to them; but the whole of the attributes of a preference share are limited and defined on its birth. It has a preference, and such a preference as is given to it by the resolution; and I think that that has always been well understood by all persons having to do with company matters. I quite agree with the quotation from Sir Francis Palmer's book that the ordinary bargain is that the preference shareholder is to have (say) 5 per cent. preference, and under circumstances of that bargain he gets 5 per cent. and no more; and the elaborate provisions of the latter suggestions and requirements of promoters of companies and others that find their places in Sir Francis Palmer's book shew that this more elaborate system is the invention of a later date to meet later requirements. This is an old common form, and I think it would have startled any one twenty years ago to have been told that it had the effect of entitling the shareholder to anything more than a preferential dividend of 10 per cent. The learned judge in his judgment has not even carried out what he has himself suggested. The point which was made most of, I think in consequence of the suggestion in Sir Francis Palmer's book, and possibly of the judgment of Swinfen Eady J. in *In re Espuela Land and Cattle*

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Co. (1), was founded on capital and not dividend. To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern. As to what may happen in a winding-up I express no opinion. Sir Francis Palmer says this, immediately following the passage read by the Master of the Rolls, in Palmer's Company Precedents, 11th ed. pt. i. p. 814: "Where preference shares are given a preference as regards capital, that does not impliedly exclude them from sharing in the surplus assets in winding-up, after clearing off the whole of the paid-up capital: *In re Espuela Land and Cattle Co.* (1) It is therefore open to contention that the attachment of a preferential dividend does not impliedly exclude the right to participate in surplus profits after paying a like dividend on the subordinate shares. In order, however, to preclude any question on this point, it has for some time past been customary to insert express words negativing the right of preference shareholders to participate in further profits."

I have no doubt the draftsman was wise to avoid any such contention as is made in the present case; but, in my opinion, it was quite unnecessary, because I am unable to see that there is any foundation for the suggestion at all. Therefore I am, with the greatest possible respect, unable to agree with the decision of Joyce J.

KENNEDY L.J. I entirely agree. It seems to me that the learned judge in the Court below has given a meaning which is not the natural meaning to the language of the resolution, and that no authority has been cited to justify such a construction. I think this appeal should be allowed.

Solicitors: *Ashurst, Morris, Crisp & Co.; Coward & Hawksley, Sons & Chance.*

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[1912 J. 912.]

[CHANCERY OF THE COUNTY PALATINE OF LANCASTER, LIVERPOOL DISTRICT.]

Company — Memorandum of Association — "Business of life insurance" prohibited—Bond Investment Policy—Provision for Return of Premiums in Event of Death before Expiration of Fixed Period—Ultra vires—Policy on Human Life—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 2, 30; *Sched. V., Form* (*E.*), *clause* 7.

A company was incorporated under the Companies Acts, 1862 to 1900. Its objects as stated in its memorandum of association were (inter alia) "to carry on and transact every kind of insurance and guarantee business in all branches (except the business of life insurance)," and it was thereby expressly provided that "Nothing herein contained shall empower the company to carry on the business of life assurance, or the granting of annuities within the meaning of the Life Assurance Companies Act, 1870."

The company had issued a number of investment policies which were all in one or other of two forms. The first form, called Policy Form A, was therein described as an investment policy, at a weekly premium of 6*d.* to secure 22*l.* 10*s.*, namely, 6*l.* at the end of five years, 7*l.* 10*s.* at the end of ten years, and 9*l.* at the end of fifteen years. The policy charged the assets of the company with the payment to the assured or his representatives or assigns of the sums aforesaid and provided that in the event of the death of the assured before the fifth year all premiums paid would be returned in full, and after the fifth and tenth years all premiums paid since the last payment made by the company would be returned. The second form, called Policy Form B, differed slightly from Policy Form A. The policy purported to secure the payment of a certain sum at the end of a fixed term in consideration of a weekly premium and charged the funds of the company with its payment, and provided that if the assured should die before the date on which the sum became payable a percentage of the premiums received on account should be payable to the representatives or assigns of the assured. The company had not deposited 20,000*l.* as required by s. 2 of the Assurance Companies Act, 1909 :—

Held, that both forms of policies were policies of insurance on human life and that the company was therefore carrying on the business of life

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assurance contrary to the provisions of the memorandum of association, and that the issue of the policies was accordingly ultra vires the company.

Held, also, that the company was carrying on "life assurance business" within the meaning of s. 1 of the Act of 1909, and that, inasmuch as it had not made the deposit of 20,000*l.* required by s. 2 of the Act, the policies were illegal.

Prudential Insurance Co. v. *Inland Revenue Commissioners* [1904] 2 K. B. 658, and *Flood* v. *Irish Provident Assurance Co.* (reported p. 597, post), followed.

APPEAL from a decision of Dudley Stewart-Smith, K.C., sitting as Deputy of the Vice-Chancellor of the County Palatine of Lancaster.

The action was brought by the plaintiff on behalf of himself and all other shareholders in the defendant company against the defendant company and J. M. Corless, a policy-holder therein, for a declaration that certain investment policies issued by the defendant company were policies of assurance on human life and were illegal and ultra vires and void, and for an injunction restraining the defendant company from issuing any further policies of assurance on human life and from carrying on the business of life assurance.

The facts of the case as appeared from the statement of claim, which were admitted, were as follows:—

The defendant company was incorporated in 1906 under the Companies Acts, 1862 to 1900, with a capital of 10,000*l.* divided into 10,000 shares of 1*l.* each.

By clause 3 of the memorandum of association the objects for which the company was established were stated to be (inter alia) the following:—

"(*a*) To insure against loss of, or damage to, tenements, merchandise, animals, and other property and effects, real and personal, by fire, storm, accident, burglary, house-breaking, robbery, or theft.

"(*b*) To guarantee the fidelity of receivers, liquidators, administrators and other persons filling, or about to fill, situations of trust, or confidence . . . .

"(*c*) To guarantee and indemnify sureties, trustees, employers, and others against loss or liability by reason of the bankruptcy,

insolvency, misconduct, or fraud of principals, co-trustees, agents, or any other persons or by reason of any error of judgment or misfortune.

"(*d*) To guarantee the performance of contracts of all kinds . . . .

"(*e*) To assure compensation or payment in case of injury to health or limb by railway accident, or shipwreck, or other perils of land or water, or any other accident or misadventure or violence, during any journey or voyage by land or water, or during any limited or specified time, excepting accidents terminating fatally; and to assure payment during sickness or incapacity arising from the above mentioned or any other causes; and to indemnify principals and employers against liability to make compensation by reason of injury or damage occurring to, or caused by agents, servants, workmen, or others."

"(*g*) Generally, to carry on and transact every kind of insurance and guarantee business in all branches (except the business of life insurance), and in consideration of a single payment or of subscriptions by weekly, monthly, yearly, or other instalments to issue house purchase certificates, or other securities of the company, payable at such times and in such manner as the company may think fit."

"(*s*) To do all or any of the above things either as principal or agent, and either alone or in conjunction with others, in any part of the world, and to make and carry into effect any arrangement as to sharing profits or otherwise, and generally to do all such things as are incidental or conducive to the attainment of the above objects or any of them. Provided that nothing herein contained shall empower the company to carry on the business of life assurance, or the granting of annuities within the meaning of the Life Assurance Companies Act, 1870."

The defendant company had issued a number of investment policies of which two examples were given in the statement of claim and were thereinafter referred to as "Policy Form A" and "Policy Form B."

Policy Form A was in the following terms:—

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"THE LAW INTEGRITY INSURANCE COMPANY, LIMITED.
"(Incorporated under the Companies Acts, 1862 to 1900.)
"Chief Office:
"38, Church Street, Liverpool.
"*No alteration can be made in this Policy except at Chief Office.*
"INVESTMENT POLICY TABLE No. ELEVEN. POLICY No.
"Weekly Premium: SIXPENCE.
"(Amount Payable at end of term):
"TWENTY-TWO POUNDS TEN SHILLINGS.
"i.e., £6 at end of five years.
£7 10*s.* at end of ten years.
£9 at end of fifteen years.

"THIS IS TO CERTIFY that an Investment upon the life of residing at has been duly effected for the above-named sum with the LAW INTEGRITY INSURANCE COMPANY, LIMITED, payable in fifteen years from date, as above.

"NOW THIS POLICY WITNESSETH that, if the said Premium is duly paid to the said Company, in this and every subsequent year, in accordance with the terms of Prospectus, the Funds or Property of the Company shall be charged with and become and be liable to pay to the Proposer, or his or her representatives, Executors, Administrators, or Assigns, the sum aforesaid. In the event of death before the 5th year all premiums will be returned in full. After the 5th year and up to the 10th year all premiums paid since last payment made by the Company will be returned. After 10th year and before end of period all premiums since last payment made by the Company will be returned.

"IT IS HEREBY DECLARED AND AGREED that all provisions, conditions, and notices of this Policy shall be deemed provisions, conditions, and notices precedent to any claim hereunder.

"IN WITNESS WHEREOF, we, the undersigned, being two of the Directors of the said Company, have hereunto set our hands this day of 19 .

"*Directors*

"*Secretary*
"*Examiner*
"*Agent*
"*Address*

The conditions indorsed on the policy provided (1.) for the allowance of a period of grace for payment of premiums in case of unemployment or incapacity through sickness, (2.) for the renewal of the policy on certain terms in the event of its lapse through non-payment of premiums, and (3.) for the settlement of disputes by arbitration.

Policy Form B was in the following terms:—

"THE LAW INTEGRITY INSURANCE COMPANY, LIMITED.

"(Incorporated under the Companies Acts, 1862 to 1900.)

"Chief Office:

"38, Church Street, Liverpool.

"*No alteration can be made in this Policy except at Chief Office.*

"INVESTMENT POLICY TABLE No. POLICY No.

"Premium

"(Amount payable at end of term)

"£

"THIS IS TO CERTIFY that an Investment upon the life of residing at has been duly effected for the above-named sum with the LAW INTEGRITY INSURANCE COMPANY, LIMITED, payable in years from date.

"NOW THIS POLICY WITNESSETH that, if the said Premium is duly paid to the said Company, in this and each and every subsequent year, in accordance with the terms of Prospectus, the Funds or Property of the Company shall be charged with and become and be liable to pay to the Proposer or his or her representatives, Executors, Administrators, or Assigns, the sum aforesaid. Or in case the said Assured should die before the above-mentioned date on which the said sum assured is payable, then per cent. of the Premiums received on account thereof shall become due and payable in like manner.

"IT IS HEREBY DECLARED AND AGREED that all provisions, conditions, and notices of this Policy shall be deemed provisions, conditions, and notices precedent to any claim hereunder.

"IN WITNESS WHEREOF, we, the undersigned, being two of the

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directors of the said Company, have hereunto set our hands, this day of 19 .

" *Secretary*

" *Directors*

" *Examiner*

" *Agent*

" *Address*

The conditions indorsed on this policy were in the same terms as those indorsed on Policy Form A.

The plaintiff was the holder of eighteen shares of 1*l.* each in the capital of the defendant company.

The defendant Corless was the holder of two current investment policies, one issued in Policy Form A and the other in Policy Form B. There were numerous other holders of similar investment policies, and the defendant Corless had been appointed to represent them.

The plaintiff alleged that the defendant company was receiving considerable sums of money in respect of premiums on investment policies in Forms A and B and was also making payments to policy-holders under such policies out of the moneys of the defendant company. He further alleged that these investment policies were policies of assurance upon human life within the meaning of the Assurance Companies Act, 1909, and that the defendant company was carrying on life assurance business within the meaning of that Act; that the defendant company had not made any deposit of 20,000*l.* in respect of the life assurance business so carried on by it as required by that Act, nor had it otherwise complied with the requirements of the Act in respect of its life assurance business; and that the investment policies issued by the defendant company were accordingly illegal and void for illegality. He also alleged that these investment policies were beyond the powers of the defendant company and were issued in violation of the conditions contained in its memorandum of association.

The action was tried before the Deputy of the Vice-Chancellor on July 1, 1912.

At the trial it was conceded that the premiums payable in respect of the investment policies in Policy Form A were 6*d.* per

week or a multiple of 6*d.* and that the premiums payable in respect of each of the policies in Policy Form B varied according to the amount secured. It was also conceded that no person who applied for an investment policy in either of the forms was required to undergo a medical examination and that the premiums did not vary with the age of the applicant. It was not contended that the defendant company carried on life assurance business otherwise than by the issue of policies in the above-mentioned forms.

On July 8 the Deputy of the Vice-Chancellor delivered a considered judgment in which he held that the defendant company did not issue policies of insurance upon human life or carry on the business of life insurance within the meaning either of its memorandum of association or of the Assurance Companies Act, 1909, and that the plaintiff was not entitled either to the declaration or injunction he claimed. He accordingly made a declaration negativing the claim and stating that the policies were not policies of insurance on human life and were not illegal or ultra vires.

From this decision the plaintiff appealed.

McCall, K.C., and *J. Rutherford*, for the appellant. The policies in question are policies to secure the payment of given sums of money upon the happening of a particular event contingent upon the duration of human life. They are therefore policies of life assurance: Bunyon on Life Assurance, 4th ed. p. 1. The question what constitutes a policy of assurance upon a contingency depending on the duration of human life was discussed in *Prudential Insurance Co.* v. *Inland Revenue Commissioners* (1) and in *General Accident Assurance Corporation* v. *Inland Revenue Commissioners.* (2) In the former case Channell J. held that an instrument whereby it was contracted that, in consideration of a payment by a person of a weekly premium of 6*d.*, a sum certain was to be paid to him on attaining the age of sixty-five, or, in the event of his dying under that age, a smaller sum was to be paid to his executors, was a policy of insurance upon a contingency depending upon a life within the

(1) [1904] 2 K. B. 658. (2) (1906) 8 F. 477.

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meaning of s. 98 of the Stamp Act, 1891. The definition of "policy of life insurance" in that section is substantially the same as the definition of "policy on human life" in s. 30 of the Assurance Companies Act, 1909. (1) That decision is applicable to the present case. In *Flood* v. *Irish Provident Assurance Co.* (2) the Irish Court of Appeal held that policies which were similar in form to those in this case were policies on human life. It is submitted, therefore, that these policies are assurances on human life. If that is so, they are ultra vires and void as contravening the provisions of the memorandum of association and are also void under the Assurance Companies Act, 1909, by reason of the non-compliance by the company with the provisions of that Act.

Buckmaster, K.C., and *Jeffreys Collinson*, for the respondent company. These policies are not, it is submitted, policies of life assurance, and do not offend the provisions of the Assurance

(1) The Assurance Companies Act, 1909, provides:

Sect. 1. "This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established before or after the commencement of this Act and whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of all or any of the following classes:—

"(*a*) Life assurance business; that is to say, the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life;

. . . . .

"(*e*) Bond investment business; that is to say, the business of issuing bonds or endowment certificates by which the company, in return for subscriptions payable at periodical intervals of two months or less, contract to pay the bondholder a sum at a future date, and not being life assurance business as hereinbefore defined;

subject as respects any class of assurance business to the special provisions of this Act relating to business of that class."

Sect. 30. "Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications:—

"(*a*) 'Policy on human life' shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life."

(2) See note at end of this report, p. 597.

Companies Act, 1909. They constitute contracts which provide that upon certain periodical payments being made for a definite period of time certain lump sums will be repaid. The payment of these sums is quite independent of the life of the person who takes out the policy. They enable the representatives of the assured, if they so desire, to continue the payments after his death. If they do not, then they can get back the whole or a portion of the premiums paid. There is nothing in the policy which is dependent on the age, health, or length of life of the assured. The policy can be taken out at any age. It is true that the policy on the face of it states that it is an investment upon the life of the assured, but that is simply to shew who is the holder of the policy. Nothing is introduced into the policy in the nature of a contingency depending on the duration of human life. It is immaterial to the company by whom the premiums are paid. The first witnessing part of the policy requires the company to pay to the assured or his representatives at the end of the fixed period. There is nothing in the contract which would enable the company to refuse to receive premiums after the death of the assured.

[FARWELL L.J. Is not the meaning of the policy, so far as you have gone, this, that the company will pay the sum at the expiration of the fixed period if the assured is then alive?]

That is not, it is submitted, its meaning. Insurance companies have regarded these policies as thrift policies and have allowed the benefits secured by them to be continued to the representatives of the assured. If the reference in the policy to the certificate be struck out, there will remain nothing in the policy which refers to the life of the assured. If, however, the view for which we have been contending is not the correct one, then it is submitted that the policy is an endowment policy to pay a person a certain sum if he lives to a certain date, but, if he dies before that date, to return the premiums paid by way of a compassionate allowance. The contract in the present case differs from that in *Prudential Insurance Co.* v. *Inland Revenue Commissioners*.(1) There the payment of 6*d*. might have assured the payment of 30*l*. in case of immediate death. That was clearly

(1) [1904] 2 K. B. 658.

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a case of life assurance. "Bond investment business" is defined by s. 1 (*e*) of the Act of 1909 as "the business of issuing bonds or endowment certificates by which the company, in return for subscriptions payable at periodical intervals of two months or less, contract to pay the bondholder a sum at a future date, and not being life assurance business as hereinbefore defined." That definition covers such policies as those in the present case. Further the Act contemplates that allowances will be made on the death of the assured in the case of a bond investment: see Sched. V., Form (E.), clause 7. By s. 1 (*a*) "life assurance business" is defined as "the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life." That definition points to a risk to be insured against, namely, the risk of the early death of the assured. In the present policies the element of risk is wanting. It is submitted, therefore, that the company does not carry on the business of life assurance either within the meaning of the memorandum of association or of the Act of 1909.

Courthope Wilson, for the respondent Corless, adopted the same argument. The Act of 1909 draws a clear distinction between life assurance business and bond investment business. Sect. 3, sub-s. 2, provides that the fund of one business shall not be liable for the contracts in respect of the other business. Sched. VI. of the Act, which contains the rules for valuing policies and liabilities, provides that a policy of life assurance shall be valued according to the "contingency upon which it is payable," but that a bond investment policy shall be valued "according to the date at which it is payable." In *Gould* v. *Curtis* (1) it was held that an assured was entitled to deduct the whole of a premium from his assessment in the case of an endowment policy. A provision in a policy for the return of the premiums in case of the death of the assured does not in itself make the policy a policy of life assurance.

McCall, K.C., was not called upon to reply.

COZENS-HARDY M.R. This is an appeal from the decision of the Deputy of the Vice-Chancellor of the County Palatine of

(1) [1912] 1 K. B. 635.

Lancaster, and it raises a question of very considerable importance. The company in question here, the Law Integrity Insurance Company, Limited, is a company which was founded in 1906, and its objects are defined in clause 3 of its memorandum of association both positively and negatively. I pass to sub-clause (*g*), which authorizes the defendant company "Generally, to carry on and transact every kind of insurance and guarantee business in all branches (except the business of life insurance)." There is one other sub-clause which I will just mention, although I do not think it is of very great importance. That is the very last sub-clause, sub-clause (*s*): "Provided that nothing herein contained shall empower the company to carry on the business of life assurance, or the granting of annuities within the meaning of the Life Assurance Companies Act, 1870." Now the words "except the business of life insurance" in the memorandum and articles of association are words which one must construe according to their ordinary meaning in any legal document, and, of course, by reference to works of authority. We are not left in the dark on that point. I think it is obviously legitimate in a matter of this kind to look at works of authority on this branch of the law, and also at statutes dealing with this class of business. I take, first of all, the following passage from Mr. Bunyon's book on Life Assurance (4th ed. p. 1), a book of high authority: "The contract of life insurance may be further defined to be that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another." Perhaps one of the first Acts dealing with this branch of the law, which is of great importance to insurance companies, was the Policies of Assurance Act, 1867. That Act enabled assignees of life policies to sue at law in their own names, which they could not do before, and defines the expression "policy of life assurance" to mean "any instrument by which the payment of monies, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured," and the expression "assurance company" to mean and include "every corporation, association,

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society, or company now or hereafter carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object or objects."

The Life Assurance Companies Act, 1870, which has been referred to, did not contain any definition of "policy of life assurance" or "life assurance business." That Act is one of the three Life Assurance Companies Acts which were repealed and substantially re-enacted by the Assurance Companies Act, 1909. This company was, of course, formed before that Act was passed.

Now what has the defendant company done? It has issued policies which are described as investment policies. I will take first of all the Policy Form A, and next the Policy Form B. [His Lordship read the terms of the Policy Form A, and continued:] As a matter of construction, I feel no doubt that the effect of that policy is to render the defendant company liable to pay 6*l.* at the end of five years only if the proposer is alive at that date, and that the liability of the company is precisely the same at the end of the ten years or the fifteen years. I cannot assent to the view which Mr. Buckmaster in his forcible argument has presented to us, that the company is liable to pay these sums of 6*l.*, 7*l.* 10*s.*, and 9*l.* at the expiration of the periods of five, ten, and fifteen years, irrespective of the fact whether the assured be then alive or dead, although in the event of death before the expiration of any of those periods an option is given, and only an option, to claim, instead of those sums, a return of the premiums paid. I think that to adopt that conclusion is to really shut one's eyes to the plain and manifest meaning of the policy, and in my opinion therefore we must proceed to consider the question on the footing that these sums are payable only if the proposer is alive at the critical dates. There is a further obligation on the part of the company, if death occurs in the interval between these periods, to return the premiums. The Policy Form B is possibly still plainer. [His Lordship read the terms of the policy, and continued:] It is quite clear that the obligations on the part of the company under that policy are alternative obligations, either to pay the sum named if the proposer is alive, or to return the amount of the premiums, or a

certain proportion of them, if he is dead. I therefore think that these policies are life policies within the meaning of the passage in Bunyon on Life Assurance which I have read. Their effect is to constitute an agreement by the defendant company to pay a given sum on the happening of the particular event contingent on the duration of the life. That being so, apart altogether from the Act of 1909, it seems to me reasonably plain that the defendant company is carrying on the business of life assurance; and that is contrary to and prohibited by its memorandum of association. I desire on this point to adopt the judgment of Channell J. in *Prudential Insurance Co.* v. *Inland Revenue Commissioners* (1), which appears to me to be extremely clear and forcible, and, if right, is conclusive on the matter. I think it is perfectly right.

If then it is ultra vires of the defendant company to carry on this business at all, it is not perhaps very material to spend much time in considering the Act of 1909, an Act which does apply to companies formed prior to the date of its passing, although with certain differences which I will not stop to enlarge upon. That Act consolidates and amends, and extends to other companies carrying on insurance or assurance business the law relating to life assurance companies. "Life assurance business" is defined in s. 1 as "the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life," and s. 30, which expressly deals with companies carrying on life assurance business, speaks of "policy on human life," which is exactly the same expression as that used in s. 1, except that it does not contain the words "of assurance." I am quite unable to appreciate that there is any distinction between the two expressions. Sect. 30 provides that "'Policy on human life' shall mean any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life," and, without going through the Act in detail, there is in s. 2 a prohibition against life assurance companies carrying on the business of life

(1) [1904] 2 K. B. 658.

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assurance as thereby defined without paying a deposit of 20,000*l.*, which the defendant company has not done. Therefore, even if I am wrong in the view I take that the business was wholly ultra vires of the defendant company, still the defendant company cannot properly carry it on until it has found a deposit of 20,000*l.*, which is an assurance fund really for the protection and safety of the policy-holders. That being so, I do not think it is necessary for me to say anything more about the matter. I am bound, however, to say that I cannot follow the chain of reasoning adopted by the learned Deputy of the Vice-Chancellor. I think, therefore, that this appeal must succeed, and that there must be a declaration in the form asked for, that the Policy Forms A and B are respectively policies on human life, and that there should be an injunction as claimed.

FARWELL L.J. I am of the same opinion on both points. The question is, what is the meaning of life assurance? I venture to adopt what Holmes L.J. said in *Flood* v. *Irish Provident Assurance Co.* (1), which was a case curiously similar to the present one. The words of the memorandum of association there were "policies of insurance upon or in any way relating to human life." He says: "I find an excellent description of such policies in the defendant company's memorandum of association, 'policies of assurance upon or in any way relating to human life,' and if it were necessary for me to define policies of assurance on human life within the meaning of the Life Assurance Companies Act, 1870, I would give as the definition the words I have quoted." With that I entirely agree. I think it is not merely on human life, but it is also in any way relating to human life. That is the view which has been taken by Mr. Bunyon in the passage already cited, and although the decision of Channell J. in *Prudential Insurance Co.* v. *Inland Revenue Commissioners* (2) turned on s. 98 of the Stamp Act, 1891, which defines "policy of life insurance" as "a policy of insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives," inasmuch as I think the same construction should be given to the words "assurance on human

(1) See note at end of this report, p. 597. (2) [1904] 2 K. B. 658.

life," his decision in that case is to my mind a guiding authority in the present case, and I entirely agree with it.

I have great difficulty in following Mr. Buckmaster's ingenious argument on the Act of 1909. Sect. 1 of that Act intends to draw a clear-cut distinction between life insurance and bond investment, and to exclude bond investment from life assurance. Mr. Buckmaster suggested that in Sched. V., Form (E.), which is the form given as applicable to bond investment business, it is provided by clause 7 that "Full particulars as to the terms and conditions upon which allowances are made on the death of a policy or certificate holder, with specimen values as required under Heading No. 6." Those are particulars of the statement required by s. 6 of the Act to be prepared and returned to the Board of Trade, but the forms suggested are only such as are applicable to the case, and s. 22 enables the Board of Trade to make any amendment in the forms which may be necessary if inapplicable. If it be the fact that there are bond investment businesses within the meaning of s. 1 which do in fact intrench on life insurance business, this form in the schedule cannot make them valid, or authorize the allowance to be made, because the effect of making it would be to make a bond investment business a life insurance business. The Act discriminates between the two and makes provision with regard to each of them. I agree on both grounds that this appeal must be allowed.

KENNEDY L.J. I agree. It seems to me that what we have to consider is this. There are two questions in this case, one being as to the duty of the defendant company to conform to the Act of 1909, which according to the case put forward by counsel for the appellant was not done, and the other is as to the validity of these policies, having regard to the memorandum of association of the company itself. The passages in which the matter is referred to in the memorandum are clause 3, sub-clause (*g*), which expressly excludes the business of life insurance, and sub-clause (*s*), which says "Provided that nothing herein contained shall empower the company to carry on the business of life assurance, or the granting of annuities within the meaning of

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the Life Assurance Companies Act, 1870." Sect. 2 of the Life Assurance Companies Act of 1870 defines the term "company" as meaning "any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom."

Now the question is, looking at the memorandum of association first of all, is the defendant company a company which does carry on life assurance business? It appears to me that it clearly is in regard to the two forms of policies which are set out in the case before us. It is strenuously argued, as it must be, by the respondents here, that these policies are not assurance policies upon human life. I do not myself think that there could be a better illustration of what in my opinion is the incorrectness of that view than the fact that in each case a certificate is given that the policy is an investment "upon the life of"; and if you have these words, and if anything turns upon the exact preposition, it is the preposition "upon" which occurs in the statute and is also to be found in the document the validity of which is here impeached both on the ground that it contravenes the memorandum and also on the ground that it contravenes the statute. I think it is quite clear, in spite of the argument which has been addressed to us by Mr. Buckmaster, that each of these documents constitutes a policy of assurance upon human life. You may call it if you like an investment, or you may call it a policy, or you may call it a contract. It is a contract which in its essence is a contract within the words "policy of assurance upon human life," and I do not myself wish to add anything to the statement of the essence of a life policy which is contained in the judgment of Channell J. in *Prudential Insurance Co.* v. *Inland Revenue Commissioners*. (1) I think, judged by any test of what is an assurance upon human life or a policy upon human life, both of these contracts are such, and it is to my mind reasonably clear that the conclusion of the judgment of the Court below, of the exact basis of which I am not absolutely sure, cannot be sustained. The argument of

(1) [1904] 2 K. B. 658.

Mr. Buckmaster has proceeded on somewhat, if not altogether, different lines. But from any point of view, whether taking the judgment below or the argument here, I think that counsel for the appellant have made out a case which entitles the appellant to the declaration and injunction which the Master of the Rolls has read.

Solicitors: *Pritchard & Sons, for Collins, Robinson, Driffields & Kusel, Liverpool; A. J. Carruthers, for Carruthers & Collinson, Liverpool.*

W. I. C.

NOTE.

Since the hearing of the above case a report of *Flood* v. *Irish Provident Assurance Co., Ld.* has appeared in the Irish Law Times Reports for September 7, 1912 (46 I. L. T. 214), but as that series of reports is not easily accessible to the profession in England, it is thought that the following report will prove useful.

COURT OF APPEAL (IRELAND), June 27, 28; July 28, 1910.

FLOOD *v.* IRISH PROVIDENT ASSURANCE COMPANY, LIMITED.

[1909 No. 648.]

THIS was an action brought by policy-holders of the defendant company against the company (inter alia) for a declaration that the company was carrying on the business of a life assurance company within the United Kingdom and for an injunction to restrain it from doing so, and in the alternative for a return of all premiums paid with interest thereon.

The company was incorporated under the Companies Acts, 1862 to 1898, in December, 1900. The objects for which it was established as set forth in clause 3 of its memorandum of association were (inter alia) as follows:—

"(*a*) To establish, acquire, carry on and develop the business of a fire, accident, guarantee, indemnity, burglary, plate-glass, sickness, medical aid, marine assurance company, and such other business of any kind, excepting the issue of policies of assurance upon or in any way relating to human life, or the assurance against accidents terminating fatally, as the company may deem conducive to its interests.

"(*b*) In consideration of a single payment or of subscriptions by weekly, monthly, yearly, or other instalments, to issue bonds or other securities of the company upon all or any part of the property of the company, including the uncalled capital, and payable at such times as the company may think fit, provided that nothing herein contained shall authorize the company to grant annuities or assurances on human life."

The company had issued to the plaintiffs endowment policies for fixed sums payable at fixed dates at fixed weekly premiums which provided that

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if the assured should die before the expiration of the endowment period the company should return to the person legally entitled to the benefit of the policy a percentage of the amount of all premiums which should have become due up to the date of the death of the assured and had been duly paid.

On May 18, 1910, the Master of the Rolls in Ireland (Meredith M.R.) dismissed the action. From this decision the plaintiffs appealed.

The appeal was heard on June 27 and 28, 1910.

Ronan, K.C., *Matheson, K.C.*, *Powell, K.C.*, and *A. Alfred Dickie*, for the appellants.

C. A. O'Connor, S.-G., *Herbert Wilson, K.C.*, and *McGusty*, for the respondent company.

Cur. adv. vult.

The facts and arguments sufficiently appear from the judgments of the Court of Appeal.

July 28, 1910. WALKER L.C. The plaintiffs in this action contend that the defendant company issues, or is liable under, policies of assurance on human life within the United Kingdom within the meaning of the Life Assurance Companies Act, 1870, and that it is bound under s. 3 of the Act to deposit the sum of 20,000*l.* with the Accountant-General of the Court of Chancery. Sect. 3 of that Act does impose such an obligation if the defendant company comes within its terms, and s. 18 makes the company liable to a penalty of 50*l.* a day for every day during which it makes default in complying with the requirements of the Act. The required deposit is, by s. 1 of the Life Assurance Companies Act, 1872, deemed to form part of the life assurance fund of the company.

Three of the plaintiffs—Gerald Flood, Johanna Fortune, and Patrick Cullen—are the holders of subsisting policies in the defendant company. On April 8, 1907, the defendant company issued to Gerald Flood an endowment policy on his life for 50*l.* payable at the end of eight years at a weekly premium of 2*s.* 1*d.*, and it was provided by the policy that, if the assured should die before the expiration of the endowment period of eight years, the defendant company should return to the person or persons legally entitled to the benefit of the policy 75 per cent. of the amount of all premiums which should have become due up to the date of the death of the assured and had been duly paid. In the proposal which Gerald Flood signed he states, in answer to a question in it, that his age next birthday was twenty-seven years. On March 1, 1909, the defendant company issued to Johanna Fortune an endowment policy depending on the life of her daughter, aged eight years, for the sum of 100*l.* payable at twenty-one years of age at the half-yearly premium of 3*l.* 4*s.* 9*d.*, and it was provided by the indorsement on the policy as follows: "In the event of death after issue of this policy and prior to the expiration of 3 years 50 per cent. of the premiums will be returned. At any time after 3 years and prior to the expiration of 5 years 75 per cent. of the premiums paid will be returned. After 5 years 85 per cent. will be returned, provided this policy is then in force." By the proposal signed by the mother she is required if there were any other policies

or certificates then in force with the defendant company upon the same life to give the particulars. The assured is asked if she is in good health, and answers are to be given by the mother on the basis of the policy being "upon the life of another." It appears renewal notices were sent as for "policy on the life of Johanna Fortune." On February 1, 1909, the defendant company issued to Patrick Cullen a document called an endowment house purchase certificate for 100*l.*, payable at the end of twenty years, with an addition of 4*l.* By a condition indorsed it was provided that "the premiums paid are not withdrawable," but if the holder died during the certificate period, the defendant company would pay "the total amount of all subscriptions paid." Renewal notices were sent as on a policy on his life. On April 20, 1903, the defendant company issued to John M. Tierney an endowment policy for 25*l.*, and on October 20, 1902, issued to Kate Foreman an endowment policy for 10*l.*, and on May 30, 1904, issued to Dr. Connor O'Byrne a policy for 200*l.*, payable at the end of eight, five, and twelve years respectively. Those three policies were similar in form to those issued to the first two plaintiffs named. Before the present action was brought these policy-holders, Tierney, Foreman, and Connor O'Byrne, having become alarmed at the supposed unsatisfactory condition of the defendant company, ceased to pay the premiums, and the three policies accordingly lapsed. The statement of claim in respect of these policies states that these plaintiffs are willing to pay up the arrears of premiums on getting proper policies charged on the insurance fund and the 20,000*l.* when lodged. The plaintiffs also collectively claim in the alternative that they are entitled to a return to them of all premiums paid, with interest thereon at 4 per cent. The constitution and powers of the defendant company, which is a corporation formed under the Companies Acts, are most important to state. The material ones are contained in the memorandum of association. [His Lordship read sub-clauses (*a*) and (*b*) of clause 3, and continued:] I shall refer to those provisions more fully later on, but, before doing so, shall state the defence of the defendant company. It alleges, so far as material, that none of the policies issued to the plaintiffs or any of them are policies upon human life, and in paragraph 21 of the defence it says "As a further defence to this action the defendant company will contend that if as is alleged by the several plaintiffs the policies issued to them by the defendant company as set forth in the statement of claim were policies of assurance upon human life, the issue of said policies by the defendant company was ultra vires and illegal, and the said policies are void, and of no effect," and it also submits that so far as the plaintiffs claim a return to them of the premiums with interest the allegations in the statement of claim afford no ground for the relief claimed.

Two questions seem to me to arise: the one is, whether the plaintiffs have any title to maintain their claims under the Act of 1870 for an order on the defendant company to lodge 20,000*l.* or enforce a penalty for the omission to do so, and the other is whether, if the policies are void, the plaintiffs are entitled to a return of the premiums which they have paid. For the purpose of deciding the first of these questions it would not be necessary for us to express any definite opinion as to whether the policies

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issued to the plaintiffs are life policies within the meaning of the Act of 1870, because the whole case of the plaintiffs assumes that they are. It is on that that their title to maintain the suit rests, and if they are life policies it is plain they come within the prohibition in clause 3, sub-clause (*a*), of the memorandum against issuing "policies of assurance upon or in any way relating to human life." Indeed, those words seem to me to have been introduced to exclude the definition of "policy" given in s. 7 of the Policies of Assurance Act, 1867, which is "any instrument by which the payment of monies, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured," and if these policies are ultra vires and void, the title of the plaintiffs fails, and that, so far as these plaintiffs are concerned, would be sufficient to dispose of this action.

But they have an alternative claim with which, I think, we are bound to deal, and to which I have referred as the second question in the case. I think for the purpose of raising this claim there should be an amendment in the body of the statement of claim, specifically raising the question and leading up to the alternative prayer. Having regard to the defence this amendment is one which the plaintiffs are entitled to have made, and the statement of claim may be treated as so amended. It will be observed that all that a policy-holder can ever get under the policies with which we have to deal is a payment of some proportion, according to the circumstances, of the premiums actually paid by himself, so that this company trades without any risk. For the purpose of coming to a conclusion on the second question I think we are bound to decide whether the policies are policies within the terms of the prohibition in the memorandum which I have read, namely, whether they are "upon or in any way relating to human life." I have already stated the terms of the policy in each of the six cases, and the reading of them seems to me irresistibly to lead to the conclusion that they relate to human life, and if they do, they are plainly void policies. It is the defendant company which is sued as the corporate body, and there can be no estoppel against it which would justify us in saying that the policies bind the shareholders. I cannot help thinking that this company, notwithstanding the terms of the memorandum, was issuing policies which it was willing should be considered life policies. Its prospectuses, renewal notices, policies, the stamp duty it pays, and the very terms of the policies themselves lead me to that conclusion; but this does not affect the legal question whether the premiums paid on the void policies are recoverable, as being money paid without consideration.

[His Lordship then dealt with the question whether the premiums paid could be recovered back and held that they could. He also held that the claim for interest on the moneys paid, inasmuch as no demand for it had been made before action, was not sustainable.]

HOLMES L.J. The defendant company was incorporated in 1900 and carries on business in Ireland. Three of the plaintiffs hold existing policies of assurance in the company, and the three other plaintiffs were holders of policies which have lapsed by reason of non-payment of the premiums payable thereon. These policies are described in the statement of claim as policies of assurance upon human life within the United Kingdom, and it is alleged

therein that the defendant company in breach of the provisions of the Life Assurance Companies Act, 1870, has neglected and omitted (*a*) to deposit the sum of 20,000*l.* with the Accountant-General of the Court of Chancery; (*b*) to place so much of its funds as represents receipts in respect of life assurance and annuity contracts to the credit of a separate fund; and (*c*) to have an investigation made into its financial condition by an actuary, and to have an abstract of his report made in the prescribed form. The substantial relief asked for in the statement of claim is: (1.) A declaration that the defendant company is carrying on the business of a life assurance company within the United Kingdom; (2.) an order that the defendant company do forthwith deposit the sum of 20,000*l.* with the Accountant-General of the Court of Chancery, and that the life policies of the plaintiffs and of other life policy-holders of the company be declared well charged upon the said sums; and (3.) an alternative claim that the plaintiffs are entitled to a return to them of all premiums paid with interest thereon at 4 per cent. The principal defences relied on are: (1.) That none of the policies issued to the plaintiffs were policies of assurance on human life, nor has the company ever issued, nor is it liable under, policies of assurance on human life; and (2.) that if the policies issued to the plaintiffs were policies of that nature, the issue of them was ultra vires and illegal and the policies were and are void and of no effect.

The policies I have seen, while differing in some respects, have certain common features. A weekly or yearly premium is payable in respect of each of them to secure payment of a specified sum at the end of a certain number of years to the person insured, provided he is then living, and if he die while the years are unexpired, it is provided that there shall be returned to his representatives a portion of the premiums theretofore paid. The Solicitor-General has argued that these are not policies of assurance on human life in the legal sense of those words, that they are what he calls endowment policies, and that the company in issuing them and in receiving the premiums has been acting as a kind of savings bank. It is said that some risk on the part of the insurer is a necessary element in life assurance, and if this be so, and if the policies I have seen represent the usual transactions of the company, I could not imagine a safer business. No one of ordinary prudence or intelligence would enter into such contracts of assurance. The insured would be in a better position if he lodged the amount paid as premiums in the Post Office Savings Bank, from which he or his personal representatives could withdraw the full amount lodged with interest at any time. The persons insured by the policies that have been before the Court may lose, but cannot gain; and the large business done by the defendant company shews how the thrifty poor may be misled by the glowing language of a clever canvasser. Still, notwithstanding the absence of all risk to the defendant company, I am disposed to regard its policies as assurances upon human life. I find an excellent description of such policies in the defendant company's memorandum of association, "policies of assurance upon or in any way relating to human life," and if it were necessary for me to define policies of assurance on human life within the meaning of the Life Assurance Companies Act, 1870, I would give as the definition the words I have quoted, but in the view I take of the case this is

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immaterial, inasmuch as I am of opinion that our decision depends not upon the first but the second defence.

The defendant company's memorandum of association in stating the objects for which the company is established sets forth several classes of assurance, but excepts "the issue of policies of assurance upon or in any way relating to human life," and as I have no doubt that the policies issued to the plaintiffs are of this character, I hold in the words of the defence that the issue thereof was ultra vires and that the policies are void and of no effect. It follows that the plaintiffs have no interest entitling them to ask relief for the breaches of the Act of 1870, and if there was no other question to be considered, the action was rightly dismissed.

[His Lordship then dealt with the plaintiffs' alternative claim to have the premiums paid by them returned with interest thereon at 4 per cent. and concurred in the conclusions of the Lord Chancellor.]

CHERRY L.J. concurred.

Solicitors for plaintiffs : *G. D. Fottrell & Sons.*
Solicitors for defendant company : *Hayes & Sons.*

W. I. C.

WARRINGTON J. 1912 *July* 2.

JOHN HADDON & CO. *v.* R. P. BANNERMAN & SON.

[1912 H. 375.]

Design—Infringement—Pattern for Set of Type—Matrices for Casting—Sale in the United Kingdom for Shipment to India—Doing anything with a View to enable the Design to be applied—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 60.

The Patents and Designs Act, 1907, s. 60, provides : "(1.) During the existence of copyright in any design it shall not be lawful for any person (*a*) for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied ; "

The plaintiffs were proprietors of a design registered in respect of a set of type metal letters, the claim being for the pattern. The defendants were manufacturers of matrices or moulds in which types are cast, and had recently sold and delivered to the India Office in London matrices for casting type for purposes of sale in India in accordance with the plaintiffs' registered design. It was admitted that the matrices were intended for shipment to Madras, and that the design would not be applied to any type in the United Kingdom :—

Held, that, although the copyright in the design afforded the plaintiffs

no protection in India, still the acts of the defendants in this country were in contravention of the concluding words of s. 60, sub-s. (1) (*a*).

TRIAL OF ACTION.

The plaintiffs were typefounders and proprietors of a registered design No. 409,021 in class 1 for articles composed wholly of metals or in which metal predominates, the design being registered in respect of a set of type metal letters, and the claim under "Statement of Nature of Design" being "for the pattern." The design was originally registered in 1903, under which a copyright of five years was granted, which was extended for a second period of five years under s. 53, sub-s. 2, of the Patents and Designs Act, 1907.

The defendants were manufacturers of matrices or moulds in which types are cast, and had recently sold and delivered to the India Office in London matrices for casting type in accordance with the plaintiffs' registered design, but it was admitted that the matrices were intended for shipment to Madras, and that the design would not be applied to any type in the United Kingdom, but only in India, where, however, it would be applied for purposes of sale.

The plaintiffs contended that the defendants had infringed their design and claimed an injunction and damages. The question depended on the true meaning of the Patents and Designs Act, 1907, s. 60. (1)

(1) Patents and Designs Act, 1907, s. 60: "(1.) During the existence of copyright in any design it shall not be lawful for any person—

"(*a*) For the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied; or,

"(*b*) Knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.

"(2.) If any person acts in contravention of this section he shall be liable for every contravention to pay to the registered proprietor of the design a sum not exceeding fifty pounds, recoverable as a simple contract debt, or if the proprietor elects to bring an action for the recovery of damages for such contravention and for an injunction against the repetition thereof, he shall be liable

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Clauson, K.C., and *E. Russell Clarke*, for the plaintiffs. It is admitted that the Act of Parliament is not extra-territorial, and that therefore it affords the plaintiffs no protection for anything done in India, but the acts of the defendants in this country are an infringement of the concluding part of s. 60, sub-s. 1 (*a*). They have made and sold the matrices here, the only object of which is to enable the design to be applied for the purposes of sale, and it matters not that the design will be applied and the sales made abroad.

We also rely on the first part of the sub-section, and are prepared to contend that by merely applying the design to the matrices the defendants have brought themselves within the first part of the sub-section.

[WARRINGTON J. I will hear the defendants' counsel on the first point.]

Walter, K.C., and *Colefax*, for the defendants. The question is whether the concluding words of s. 60, sub-s. 1 (*a*), are applicable to the case. Apart from those words there is direct authority that the acts of the defendants are no infringement on the principle that the Act of Parliament has no effect extra territorium: *Potter & Co.* v. *Braco de Prata Printing Co.* (1) We submit that the concluding words of s. 60, sub-s. 1 (*a*), have no application to the present case. Those words would prevent the defendants from making the matrices for use in this country, but if they make the matrices for use in countries where the design can be legitimately applied without invasion of any rights, then they are not within the prohibition according to the true meaning of the sub-section. The plaintiffs have no rights at all in matrices; the typefounder and the matrix-maker are different persons altogether. There are two offences aimed at by s. 60—first, the application of the design in the United Kingdom for the purposes of sale, and, secondly, the doing anything with a view to enable the design to be "so applied," that is, where the

to pay such damages as may be awarded and to be restrained by injunction accordingly:

"Provided that the total sum recoverable as a simple contract debt in respect of any one design shall not exceed one hundred pounds."

(1) (1891) 8 Rep. Pat. Cas. 218.

application is an offence within the previous part of the sub-section. It is an unwarrantable extension of the monopoly to say that s. 60 covers things done in the United Kingdom with the sole view of enabling the design to be applied outside the United Kingdom, and such a construction of the Act will have the single effect of throwing this class of business into the hands of foreign manufacturers, which can hardly have been the intention of the Legislature. The remarks of Lord Adam in *Potter & Co.* v. *Braco de Prata Printing Co.* (1) are applicable, where he says: "The allegation is that the respondents have applied or caused to be applied to goods in class 13 the said registered designs, and have manufactured such goods for sale, and have sold them in Lisbon and other markets in Portugal, Brazil, and so on. Then they go on to say that the goods to which these alleged pirated designs have been applied have been publicly offered for sale through Graham & Co., in Portugal, Brazil, and elsewhere—that, as I read it, is elsewhere than in this kingdom; and then they go on, with reference to the illegal application of the design, to say that the respondents, in order to enable them to copy the complainers' goods, ordered through Graham & Co. the grey cloth required, and had the same manufactured and bleached in this country, and also had the necessary rollers engraved with the complainers' designs in this country, in order that the completion of the application of these designs to the goods previously ordered might be carried out. As your Lordship pointed out, it is not said that the application of the designs to the cloth was made in this country—in other words, that the manufactured article was produced in this country. There is no averment to that effect in this record, and accordingly it humbly appears to me that both as regards the averment of the application of the designs to the goods in class 13, and as regards the sale of the goods in which the pirated designs have been applied, there is no allegation here whatever that that was done in this country. . . . ."

It is clear that the plaintiffs' case rests entirely on the latter part of the sub-section, since the application of the design to the matrices (and not to the type) is not an application to an article

(1) 8 Rep. Pat. Cas. 224.

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in the class of goods for which the design is registered, that being limited to the face or fount of type.

No reply was called for.

WARRINGTON J. The question in this action turns upon the true construction of s. 60 of the Patents and Designs Act of 1907, and the concrete question is whether, according to the true construction of that section, the prohibition against doing anything with a view to enable the design to be applied involves this limitation, that the design is also to be applied in the United Kingdom, or whether the only limitation involved is that the thing itself is to be done in the United Kingdom.

The facts are very short. The plaintiffs are well-known type-founders, who have registered a design for what is technically called a face of type, sometimes a fount of type. The certificate of registration is that the design, bearing a certain official number, was registered in class 1—a wide class covering all metal articles excepting jewellery—in the name of the plaintiffs, and that a copyright of five years was granted; also that the copyright was extended for a second period of five years, and then there are these words: "The design is registered in respect of a set of type metal letters"; and the claim under "Statement of Nature of Design" is as follows: "For the pattern." Now the thing registered represents the fount of type. It is a print taken from the type of letters and figures used in the fount.

The defendants are makers of matrices for type. They tendered to the India Office for a set of matrices of this particular registered type—there is no question about that—and they made them for the India Office, to whom they sold and delivered them in this country for shipment to Madras, the application of the design to the type itself being intended to take place in Madras. These are all the material facts.

I now turn to s. 60 of the Act, which provides: "During the existence of copyright in any design it shall not be lawful for any person (*a*) for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered

proprietor, or to do anything with a view to enable the design to be so applied; or, (*b*) knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article." That section creates what I may call three separate offences. It describes three separate things which it shall not be lawful for any person to do. The first is to apply the design in the way described; the second is to do anything with a view to enable the design to be applied in the way described in the statement of the first of the offences; and the third is to expose or cause to be exposed for sale the article under the conditions specified under head (*b*). The first two offences are thrown together in the first clause of the sub-section, but that is quite immaterial. They are two separate offences. Now the second of these two offences was one which was created for the first time by the Act of 1907. Until that Act was passed the offence did not exist. The Act therefore clearly intends to increase to some extent the right of the owner of the copyright in the design. It was inserted, I have no doubt, primarily to meet such a case as that which arose in Scotland in *Potter & Co.* v. *Braco de Prata Printing Co.* (1) In that case people in England engraved on certain calico printing rollers a representation of a registered design, and they sent those rollers to Portugal, Brazil, and other places abroad to be used in calico printing, and the Court of Session decided that they were not in this country applying the design to any article within the class in which it was registered—that was the only offence created by the Act then in force—and that the Act must be read as intending only to prohibit the doing in this country of the prohibited thing, namely, the application of the design to the article, and that inasmuch as that was not done in this country the action failed. It is said that the only effect of the new words is to prohibit the doing of an act in the United Kingdom for the purpose of enabling the design to be applied in the United Kingdom. In my opinion the words mean more than that. I think that the sub-section must be read quite literally, and it says that it shall not be lawful for any person, first,

(1) 8 Rep. Pat. Cas. 218.

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"for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design," or secondly, "to do anything with a view to enable the design to be so applied." What is the meaning of those words? In my opinion they mean this. There are certain conditions attaching to the application which alone make the application an offence. The first condition is that the application shall be for the purposes of sale; the second condition is that the application shall be of the registered design to an article of a particular description; and the third condition is that it shall be without the licence or written consent of the registered proprietor. Having regard to those conditions, what is the meaning of the word "so" in the description of the second offence? In my opinion it refers to the three conditions relating to the application, that is to say, it is an offence to do anything with a view to enabling the design to be applied for the purposes of sale to an article of the particular class without the consent of the registered proprietor. Reading it in that way, how does the sub-section apply to the facts of the present case? It is clear on the admissions that the intended application in Madras is to be for the purposes of sale; the design is to be applied to the very articles themselves, namely, the face of type, the type metal letters, and it is to be applied without the written consent of the registered proprietor. The remaining question is, How far does the doctrine that a British Act of Parliament only deals with what is done in Great Britain affect the case? I agree that it affects it to this extent, that the offence described in the Act of Parliament must be committed in this kingdom. The offence described in this Act of Parliament is to do anything with a view to enable the design to be applied in a particular way. That has been done by the defendants in this country, and it seems to me that the doctrine with regard to extra-territorial legislation does not affect the question. In my opinion the defendants have been guilty of the offence with which they have been charged, that is, the offence of doing in this kingdom something—that is making the matrices—with a view to enable the design to be applied in the manner described in the earlier part of the sub-section.

In the view which I have taken on this point, it is unnecessary

for me to consider whether the plaintiffs can complain of the application of the design, or say that the defendants are applying the design to a class of goods in which the design is registered, by applying it to the matrix and not to the type. I have not heard Mr. Clauson on this point, but prima facie I should have thought that the defendants would not be committing the offence described in the Act by merely applying the design to the matrix, because, although the design is registered in the class, it is registered only in respect of a set of type letters. However, it becomes immaterial to decide that point, and I only express what at first sight appears to me to be the correct view. In my judgment the defendants have been guilty of an infringement of the design, and the plaintiffs are entitled to the usual relief.

Solicitors: *Budd, Johnson & Jecks; Boulton, Sons & Sandeman.*

A. C.

ROWELL *v.* JOHN ROWELL & SONS, LIMITED.

[1912 R. 894.]

Limited Company—Surrender of Shares—Exchange for New Shares—No Reduction of Capital involved—Validity.

A surrender of shares to a limited company, not involving any reduction of capital and not amounting to a purchase of its own shares by the company, is not necessarily ultra vires.

In 1896, pursuant to articles of association and special resolution, the holders of 6 per cent. fully-paid preference shares surrendered the same to the company in exchange for fully-paid 5 per cent. preference shares, and a contract in writing was duly filed with the Registrar of Joint Stock Companies, pursuant to s. 25 of the Companies Act, 1867. The surrendered shares were not cancelled, but were subject to be reissued by the company:—

Held, that the surrender not involving any reduction of capital was valid; that the transaction did not amount to a purchase by the company of its own shares; and that the new shares issued in exchange were fully paid up.

Teasdale's Case (1873) L. R. 9 Ch. 54, and *Eichbaum* v. *City of Chicago Grain Elevators* [1891] 3 Ch. 459, followed.

Dicta of Stirling L.J. and Cozens-Hardy L.J. in *Bellerby* v. *Rowland & Marwood's Steamship Co.* [1902] 2 Ch. 14, discussed and distinguished.

TRIAL OF ACTION.

This was an action brought against the company by two

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plaintiffs on behalf of themselves and all other holders of 5 per cent. first preference shares of the company to whom or to whose predecessors in title the said 5 per cent. first preference shares were allotted, claiming (1.) a declaration that the issued 6 per cent. preference shares of the company were validly surrendered to the company in the year 1896, and (2.) a declaration that the 5 per cent. first preference shares of the company now held by the plaintiffs and other persons to whom or to whose predecessors in title such shares were allotted in 1896 in exchange for 6 per cent. preference shares were fully paid up and that there was no liability in respect of any of the said shares.

The company was incorporated in 1894 with a memorandum of association which provided by clause 5 that "the capital of the company is 75,000*l.* divided into 2500 preference shares and 5000 ordinary shares, all of 10*l.* each, such preference shares to be entitled to a cumulative preferential dividend of 6 per cent. per annum on the amount paid (or credited as paid) thereon," and with certain preferential rights as regarded repayment of capital.

The articles of association provided:

Clause 7. "The company may, from time to time, on the recommendation of the board, and by special resolution, increase the capital of the company by the creation of new shares; and such shares shall be issued at such time and in such manner, and be paid up in such manner, and by such instalments as the special resolution sanctioning such increase shall direct; or, in case no such direction shall be given, then as the board shall think fit; and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the company, and with a special or without any right of voting; but so that no preference or privileges be given to new shares in priority to or ranking equally with the original preference shares without the consent in writing of holders of at least three fourths in value of the 2500 preference shares or such of them as shall have been issued."

Clause 9. "No share or shares in the company shall be purchased by or on behalf of the company."

Clause 34. "The board may at any time (where the law

permits) accept the surrender of any shares from any holder thereof desirous of surrendering the same on such terms as the board shall in each case determine, and the board may extinguish or cancel such shares, or may reissue the same either as fully or partly paid up, or on such terms (or may sell them) as they may think fit."

Clause 36. "Any entry on the minutes of the board and in the register of members that shares have been forfeited, or that a forfeiture of shares has been remitted, or that a surrender has been accepted, shall be conclusive evidence of such forfeiture, remission, or surrender."

Of the 2500 preference shares 1000 only were issued, and in the year 1896 those preference shares were all fully paid. There were also issued 2000 ordinary shares. In the year 1896 it was desired to increase the capital by the creation of additional preference shares and also to increase the borrowing powers of the company; and for the purpose of carrying that desire into effect it was decided to reduce the interest on the preference shares from 6 per cent. to 5 per cent., and the company, acting on advice, determined to carry out that last part of their scheme by obtaining a surrender of the existing 1000 6 per cent. preference shares and issuing in lieu of them to the then holders 1000 preference shares bearing a 5 per cent. dividend, but in all other respects exactly in the same position as the original 1000 preference shares. A special resolution of the company was passed which contained this provision: "That the capital of the company be increased by the creation of 3000 shares of 10*l.* each, to be called first preference shares, bearing a cumulative preferential dividend of 5 per cent. per annum and to have a first preference in capital as well as in dividend; that the said first preference shares, or any of them, be offered in the first place either to the original preference shareholders or to the public, and either at par or at a premium, or partly at par and partly at a premium, and generally upon such terms and at such time or times as the board of directors of the company shall determine and as shall be approved in writing by the holders of at least three fourths of the original preference shares, and that any original preference shares when surrendered be subject to reissue by the board."

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In pursuance of the above special resolution and of resolutions of the board which had been previously arrived at, the company accepted the surrender of, and the existing preference shareholders surrendered to the company, the 1000 6 per cent. fully-paid preference shares, and the company issued to each holder of those shares a corresponding number amounting altogether to 1000 5 per cent. preference shares; and on July 27, 1906, an agreement in writing providing that the shares so to be issued should be taken to be fully paid up was duly filed with the Registrar of Joint Stock Companies pursuant to s. 25 of the Companies Act, 1867.

The company being now about to acquire other properties and about to take certain steps with regard to its capital, the question arose as to the validity of the surrender of the 6 per cent. preference shares in 1896, and this action was brought for the determination of the question.

W. H. Cozens-Hardy, for the plaintiffs. The surrender involved no reduction of capital, and the parties at the time were properly advised that the transaction was valid. The decision of the Court of Appeal in *Teasdale's Case* (1) and that of Stirling J. in *Eichbaum* v. *City of Chicago Grain Elevators* (2) are direct authorities in favour of the validity of the surrender under such circumstances, Stirling J. in the latter case holding that *Teasdale's Case* (1) had not been overruled by *Trevor* v. *Whitworth* (3); and see Lindley on Companies, 5th ed. pp. 525, 526. So matters stood till the year 1902, when *Bellerby* v. *Rowland & Marwood's Steamship Co.* (4) was decided in the Court of Appeal. In that case the surrender involved both a reduction of capital and a purchase by the company of its own shares, and the case itself is therefore distinguishable from the present case; but the dicta of Stirling L.J., who to some extent departed from his previous decision, and of Cozens-Hardy L.J. seem to go further and shew that a surrender can only be supported in circumstances which would justify a forfeiture. It must be borne in mind, however, that those dicta

(1) L. R. 9 Ch. 54.
(2) [1891] 3 Ch. 459.
(3) (1887) 12 App. Cas. 409.
(4) [1902] 2 Ch. 14.

were made in a case which did involve a reduction of capital, and it is submitted that they cannot be treated as overruling the two express decisions on the point. Stirling L.J. refers to the Companies Act, 1867, which gave facilities for the reduction of capital, as a point which was overlooked in *Eichbaum* v. *City of Chicago Grain Elevators* (1), but it is difficult to see how that enactment had any bearing on the point involved: see the note to s. 9 of that Act in Buckley on the Companies Acts, 8th ed. p. 614. There is nothing in *Trevor* v. *Whitworth* (2), *Ooregum Gold Mining Co. of India* v. *Roper* (3), and *British and American Trustee and Finance Corporation* v. *Couper* (4) to shew that a surrender of shares under the circumstances of the present case is ultra vires. The present transaction was in no sense a purchase by the company of its own shares. The company gave up no assets to the surrenderors. On the other hand there was ample consideration moving from the shareholders for the issue of the new shares, and a proper contract having been filed pursuant to s. 25 of the Companies Act, 1867, these shares must be treated as fully paid up.

R. W. Turnbull, for the company. The plaintiffs are not entitled to the relief claimed. The present law on the subject is clearly laid down in *Bellerby* v. *Rowland & Marwood's Steamship Co.* (5) in terms which shew that the surrender in the present case was invalid. Moreover the transaction in effect amounted to a purchase of its own shares by the company: Palmer on Company Precedents, 11th ed. pt. i. pp. 749—751. The result is that, the old shares being still outstanding in the surrenderors, the consideration for the issue of the new shares as fully paid fails, and the holders of the new shares are liable to pay the full amount of their nominal value.

No reply was called for.

WARRINGTON J. This case involves considerable difficulty owing to the condition of the authorities. The plaintiffs are the holders of 5 per cent. first preference shares of the defendant

(1) [1891] 3 Ch. 459.
(2) 12 App. Cas. 409.
(3) [1892] A. C. 125.
(4) [1894] A. C. 399.
(5) [1902] 2 Ch. 14.

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company and they ask for a declaration that the issued 6 per cent. preference shares of the defendant company ought to be deemed to have been validly surrendered in the year 1896, and that the existing 5 per cent. preference shares which were allotted to the present holders or their predecessors in 1896 are to be deemed to be fully paid up.

The case involves two questions—first, whether a surrender of fully-paid shares in consideration of the issue of shares to precisely the same nominal amount is or is not ultra vires the company, and, secondly, whether the shares issued in exchange are properly to be treated as fully paid.

The facts are not in dispute. [His Lordship stated the facts, referring to the memorandum and articles of association and the special resolution above set out, and continued:]

The company is now desirous of taking certain steps with regard to its capital, which require or may require the assent of the preference shareholders, and the question has been raised whether what is required to be done can be done without the assent of the holders of the previously existing first preference shares; in other words, whether there are now any holders of those first preference shares, or whether the holders of preference shares at the present time are the holders only of the 5 per cent. preference shares created in 1896; and a further question has been raised whether the new shares are to be treated as fully paid up.

Now the case with which I have to deal is the surrender of shares fully paid up and therefore not involving the release of the shareholder from any liability. That is an extremely important consideration, and, in fact, it is the determining consideration in the present case, and one which in my opinion distinguishes the present case from *Bellerby* v. *Rowland & Marwood's Steamship Co.* (1), which was decided in the year 1902, and as the result of which some difficulty has arisen.

Now the first authority which has been referred to in point of time is *Teasdale's Case* (2), a decision of the Court of Appeal. That case was decided in the year 1873, and the transactions in question took place in the year 1865, prior, therefore, to the passing

(1) [1902] 2 Ch. 14. (2) L. R. 9 Ch. 54.

of the Companies Act, 1867, containing, as we all know, certain provisions relating to the reduction of capital, and providing that a reduction should not take effect until it had been sanctioned by the Court—containing, therefore, both an enabling provision empowering the company to reduce its capital and a restrictive provision that the reduction should not take effect until sanctioned. The head-note in *Teasdale's Case* (1) is this: "A company may by special resolution vary its articles so as to give itself power to accept surrenders of old shares in exchange for new." And the fact was that, in pursuance of the powers so conferred upon the company,—for it had varied its articles as referred to in the head-note—the company had accepted a surrender of fully-paid shares in exchange for fully-paid shares of the same nominal amount, although divided and apportioned in a different way. The net result of the transaction in *Teasdale's Case* (1) was not to reduce but to increase the capital of the company. That is pointed out in a note on p. 526 of the fifth edition of Lindley on Companies, and there is no question that that is accurate. The Court of Appeal in *Teasdale's Case* (1), which consisted of James L.J. and Mellish L.J., decided that the transaction was a valid transaction, but James L.J. in the course of his judgment expressed himself in a mode which was not entirely necessary for the decision of the case, and which has been subsequently questioned. He said this (2): "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." I think it is beyond question that so far as he says that a company may give itself power to purchase its own shares he withdrew that dictum in a subsequent case (3), and it has been clearly shewn not to be law by a decision of the House of Lords. But the question as to the general power to accept a surrender of shares still remains a subject for decision. Now Mellish L.J. in the same case (4) says with reference to the resolutions which he had to construe: "If the resolutions were to be construed literally, as by their own force converting the

(1) L. R. 9 Ch. 54.
(2) Ibid. 58.
(3) See *Hope* v. *International Financial Society* (1876) 4 Ch. D. 327, 336.
(4) L. R. 9 Ch. 59.

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shares without the consent of the holders, then I think they would be ultra vires, and void. But, like all other documents, they ought to be construed reasonably, ut res magis valeat quam pereat, and they ought, I think, to be construed as only intended to give power to the directors to accept surrenders of old shares, and issue new shares in their stead. An article to that effect would have been valid." Both the Lords Justices therefore in that case held that a surrender of shares in exchange for new shares of the same nominal value where both sets of shares were fully paid up was not ultra vires, but would be valid, and they decided accordingly. That case was followed by Stirling L.J., when sitting as a judge of first instance, in *Eichbaum* v. *City of Chicago Grain Elevators.* (1) In that case, as in the present case, the company was empowered to accept surrenders of shares upon such terms as should be agreed upon, and special resolutions had been passed empowering the directors to allot new shares which they proposed to create as fully paid up and issue to any holder of ordinary shares in consideration of the surrender of an equivalent amount of fully paid up ordinary shares. It was, therefore, exactly the same case as that which I have to deal with, except that in that case there was no increase of capital; and Stirling J., as he then was, held that, though the dictum to which I have referred as to the purchase of shares had been overruled by the decision of the House of Lords in *Trevor* v. *Whitworth* (2), that decision had not interfered with the authority of *Teasdale's Case* (3) on the point which it was necessary for him to decide, and he accordingly followed *Teasdale's Case.* (3) Now I have carefully looked through the speeches of the learned Lords in *Trevor* v. *Whitworth* (2), and it seems to me that the House of Lords in that case, which was a case of the purchase of shares, did distinctly overrule the dictum of James L.J. with reference to the purchase of shares. With reference to the surrender of shares each of the learned Lords expressed his opinion that a surrender of shares under the circumstances which would entitle the company to forfeit the shares, and which therefore merely takes the place of a proceeding in invitum,—substituting a

(1) [1891] 3 Ch. 459. (2) 12 App. Cas. 409.
(3) L. R. 9 Ch. 54.

voluntary proceeding for a proceeding in invitum—would be valid; but I cannot find that any one of them expressed any opinion in reference to the validity or invalidity of any other possible surrender of shares. In fact Lord Herschell was very careful to reserve power to deal with any question of surrender when it might arise. The result is that I do not think that in *Trevor* v. *Whitworth* (1) the House of Lords expressed any opinion against the validity of a surrender of fully-paid shares in exchange for other fully-paid shares. So matters rested until the case to which I have already referred of *Bellerby* v. *Rowland & Marwood's Steamship Co.* (2) came before the Court of Appeal in 1902. The head-note to the report of that case is this: "A surrender of shares in a limited company, the company releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company, and is therefore illegal and null and void on the principle of *Trevor* v. *Whitworth*. (1) A surrender of shares which has the effect of reducing the company's capital can be supported only under circumstances which would have justified a forfeiture of the shares, the validity of forfeiture being recognized by section 26 of the Companies Act, 1862, and by Table A to that Act, clauses 20, 21." That was the decision of the Court of Appeal, and nothing more was necessary for the purposes of the decision, because the case with which they were dealing did involve a release of liability, and was therefore, as it is said in the head-note, either a purchase by the company of its shares—taking its own shares in exchange for one of its own assets, namely, the unpaid capital—or it was a reduction of the capital of the company by the extinguishment of an existing liability on the part of some of its members. It was, therefore, either a purchase of shares or a reduction of capital. But two of the judges of the Court of Appeal expressed certain opinions which were not necessary for the decision of the case, and both those opinions, if read literally, are certainly against the validity of such a surrender as that with which I have to deal in the present case. I do not think that I need refer to the decision of Collins M.R.,

(1) 12 App. Cas. 409. (2) [1902] 2 Ch. 14.

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because I think he confined himself strictly to the points which it was necessary to decide, but the two learned Lords Justices did make use of expressions to which I will refer. In the first place Stirling L.J. says (1) with reference to *Trevor* v. *Whitworth* (2) and the two other cases in the House of Lords: "Upon a careful examination of what was laid down in *Trevor* v. *Whitworth* (2), *Ooregum Gold Mining Co. of India* v. *Roper* (3), and *British and American Trustee and Finance Corporation* v. *Couper* (4), I think the weight of authority is in favour of the view that forfeiture, which is specifically mentioned in the Act of 1862, stands on a special footing, and that surrenders can only be supported in circumstances which would justify forfeiture." It is to be borne in mind in reading those words that the Lord Justice is not directing his mind at all to the possibility of having to consider the validity of a surrender which does not involve a reduction of capital. He had before him a surrender which did involve a reduction of capital, and he is not considering in general terms the question of a surrender which did not involve a reduction of capital. But he goes on to say: "I wish to add a few remarks with reference to *Eichbaum* v. *City of Chicago Grain Elevators* (5) which was cited in argument. That case was decided by me on the authority of *Teasdale's Case* (6), which appeared to me to be precisely in point. There is, however, a difference, which was pointed out by Cozens-Hardy L.J. (so far as I know for the first time) during the argument of the present case, namely, that the resolutions for the surrender of the shares in *Teasdale's Case* (6) were passed in 1865, before the passing of the Companies Act, 1867, while the resolutions in *Eichbaum's Case* (5) were brought forward in 1891, after the passing of that statute. I now think that in these circumstances I ought not to have followed *Teasdale's Case* (6), and further, that, although there was in 1891 some ground for the view that the last-mentioned case was not overruled by *Trevor* v. *Whitworth* (2) (see Lindley on Companies, 5th ed. p. 526), it seems now, in face of the later decisions, much more difficult

(1) [1902] 2 Ch. 29.
(2) 12 App. Cas. 409.
(3) [1892] A. C. 125.
(4) [1894] A. C. 399.
(5) [1891] 3 Ch. 459.
(6) L. R. 9 Ch. 54.

to support that view." With reference to that the learned Lord Justice bases his remarks depreciatory of his own judgment in *Eichbaum* v. *City of Chicago Grain Elevators* (1) entirely upon the fact that the resolutions in *Teasdale's Case* (2) had been passed before the Act of 1867, which provided for the reduction of capital, but it seems to have escaped his observation that in *Teasdale's Case* (2) there was no reduction of capital at all, and that whether the company had or had not power to reduce its capital was not involved in the case. In *Teasdale's Case* (2) there was an increase of capital, and certainly no reduction, and one cannot be quite certain whether, if that point had been drawn to his attention and he had considered it, he would have still made the remarks which he did about his own decision in *Eichbaum* v. *City of Chicago Grain Elevators*. (1) Then Cozens-Hardy L.J. says this (3): "Two propositions may be asserted without doubt. First, a company may forfeit shares. This is recognised by s. 26 of the Companies Act, 1862, as well as by Table A. Secondly, it is not competent to a company to purchase its own shares, and any such transaction is ultra vires." That also is without question. Then he goes on: "I think *Trevor* v. *Whitworth* (4) also decides that, under circumstances which would entitle a company to forfeit shares for non-payment of calls, the same result may be attained by means of a voluntary surrender." That also is not in question at the present time. Further on he says this: "When, however, the transaction involves, as in the present case, the release by the company to the shareholders of uncalled capital on their shares, it seems to me that it is, within *Trevor* v. *Whitworth* (4), a reduction of capital not sanctioned by law." So far all that he had said was necessary for the decision of the case before the Court, which was a case of release of liability, and supports that decision. Then he goes on in these terms (5): "It is not necessary, in my view, for the purpose of the present case to go beyond this. But a careful consideration of the speeches of Lord Macnaghten and Lord Watson in *Trevor* v. *Whitworth* (4) and *British and*

(1) [1891] 3 Ch. 459.
(2) L. R. 9 Ch. 54.
(3) [1902] 2 Ch. 31.
(4) 12 App. Cas. 409.
(5) [1902] 2 Ch. 32.

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American Trustee and Finance Corporation v. *Couper* (1) has satisfied me that the real objection to a surrender of shares does not lie in the fact that money has been paid by the company to acquire the shares"—That is to say, it does not lie in the fact that it is a purchase—"The objection is founded on a larger proposition. A company cannot be a shareholder in itself. Every surrender of shares, whether fully paid up or not, involves a reduction of capital, which is unlawful, except when sanctioned by the Court under the Companies Acts of 1867 and 1877." It is that dictum, which is only a dictum, but of course expresses the considered view of the learned Lord Justice, which gives rise to the only real difficulty in the present case. The consideration which impresses me, however, is that I have before me an actual decision of the Court of Appeal in *Teasdale's Case* (2), and an actual decision of a Court of co-ordinate jurisdiction with myself in *Eichbaum* v. *City of Chicago Grain Elevators* (3), and am I at liberty to treat those two cases as overruled as the result of this dictum of Cozens-Hardy L.J. in *Bellerby* v. *Rowland & Marwood's Steamship Co.* (4)? That is a question upon which I feel very considerable difficulty; and I feel also this further difficulty, that while a surrender of fully-paid shares means, of course, a reduction of capital if the shares are surrendered upon terms which do not permit their reissue, in the present case the shares are surrendered upon terms which do permit their reissue, and, with all respect, I really fail to see how in that case there is any reduction of capital at all. The capital of the company remains as it was, 2500 6 per cent. preference shares, with an addition of the 3000 5 per cent. preference shares created in 1896. It is perfectly true that the company have not up to the present time reissued the 2500 shares, and it may be that they could not reissue them without the consent of the 5 per cent. preference shareholders. That question does not arise. The shares are there ready to be issued, still forming part of the capital, and it would not require any resolution of the company to increase its capital in order to enable them to reissue those shares. It seems to me, therefore, that, if the reissue of these shares would not require

(1) [1894] A. C. 399.
(2) L. R. 9 Ch. 54.
(3) [1891] 3 Ch. 459.
(4) [1902] 2 Ch. 14.

any resolution for an increase of capital, there was in fact no reduction of capital in accepting the surrender coupled with the power of reissuing these shares. The generality of the proposition, therefore, on which Cozens-Hardy L.J. founds his dictum as to the invalidity of every surrender of shares, except where it takes the place of a forfeiture, seems to me to be a matter of some doubt, because he is clearly referring in his judgment to surrenders which involve reduction, and not to surrenders which do not involve reduction. The net result is that I have here, as in *Teasdale's Case* (1), a surrender which in my opinion does not involve any reduction of capital, and I have on that point the express decision of the Court of Appeal and also the decision of Stirling J. in favour of its validity. Against that I have the dictum of Cozens-Hardy L.J., which I really think was not directed to the class of surrenders with which I have to deal, but to surrenders which do involve a reduction of capital. In my opinion, therefore, I must hold that the surrender in the present case was a valid surrender.

There is only one other point upon which that surrender might be attacked. It might be said that it involved a purchase by the company of the shares which were so surrendered. I do not think that it did. There was no parting by the company with any of their assets. All that was done was that they created new shares which they issued to the then holders, but they parted with no money and no goods and no asset, such as the shareholder's liability to calls. It was a transaction for a consideration on the one side and on the other, but it was not, in my judgment, a purchase of shares. I think, therefore, that the surrender was a valid surrender. The other question is, Are these shares fully paid up? In my opinion they are. It is quite true that in order to arrive at this result some money's worth must have passed notwithstanding that there was a filed agreement under the Companies Act, 1867. But in the present case some money's worth did pass, because the new shareholders in effect released the company from their liability to pay interest at the rate of 6 per cent. by accepting shares bearing interest at the rate of 5 per cent. instead of the old shares which bore

(1) L. R. 9 Ch. 54.

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interest at the rate of 6 per cent. I hold, therefore, that the plaintiffs are entitled to the two declarations which they claim.

Solicitors for all parties: *Stokes & Stokes, for Criddle & Criddle, Newcastle-upon-Tyne.*

A. C.

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June 19; *July* 31; *Oct.* 18; *Nov.* 4.

In re DE SOMMERY.
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[1911 D. 519.]

Will—Specific Gift of Foreign Property—Executors and Trustees—Assent of Executors — Costs of Realization — French Succession Duty— Power—Divisibility—Perpetuity.

Testatrix, who was domiciled and died in England, by her will appointed C. and D. executors, and gave all her real and residuary personal estate, except her shares in a certain French company, to "the said C. and D. (hereinafter called 'my trustees')" upon trust for sale, and to hold the net proceeds, after payment of her debts and funeral and testamentary expenses, upon trust to pay a certain charitable legacy, and to divide the residue into thirteen parts, as to eleven of them upon certain trusts, "and as to two other of such parts upon trust to pay the capital or income thereof, or neither, to my nephew E., or to apply the capital or income thereof, or any part of either, for his benefit, or for the benefit of his wife or any child or children of his as my trustees may in their absolute and uncontrolled discretion consider desirable." And she gave all her twenty-one shares in the French company "to my trustees" upon trust to sell or retain the same and to hold the same upon trust for certain persons. Seven of the shares were charged with the payment of certain legacies.

Shortly after the testatrix's death the trustees sold some of the shares, and applied the proceeds in paying a legacy charged by the will on seven of the shares. In completing their title according to French law the trustees paid certain sums claimed by the French Government by way of succession duty, and in so doing, and also in connection with the realization of the shares, they incurred certain costs:—

Held, (1.) that the trustees, being also executors, must as such have assented to the gift of the shares to themselves, and, after such assent, were entitled to the shares as trustees and not as executors, and that the French duty and costs must be borne by the shares, and not by the general estate.

In re Brewster [1908] 2 Ch. 365, followed.

Perry v. *Meddowcroft* (1841) 4 Beav. 197, doubted.

A special power which, according to the true construction of the

instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void, but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule. If a power be given to a person alive at the date of the instrument creating it, it must of course, if exercised at all, be exercised during his life, and is therefore valid. If a power can be exercised only in favour of a person living at the date of the instrument creating it, it must, if exercised at all, be exercised during the life of such person, and is therefore unobjectionable.

The instrument itself may expressly limit a period, not exceeding the legal limits, for the exercise of the power. And where the settlor has used language from which the Court may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the Court will avoid the latter only and will give effect to the power which is not open to this objection. Thus, although a power vested in the trustees for the time being of a settlement has apparently been uniformly looked on as a single and indivisible power, it may be otherwise if the power be limited to A. and B. or other the trustees of the settlement for the time being. In this case the Court may treat the settlor as having created one power vested in A. and B. while trustees, and a distinct power vested in their successors, in which case the power vested in A. and B. would be open to no objection on the ground of remoteness: *Attenborough* v. *Attenborough* (1855) 1 K. & J. 296.

Held, therefore, (2.) that the power or powers created in favour of E., his wife and children, were conferred on the trustees of the will for the time being, and not on the original trustees only (see *In re Smith* [1904] 1 Ch. 139); and that the principle of *Attenborough* v. *Attenborough* (ubi supra) was inapplicable.

Held, also, (3.) that if one power only was vested in these trustees, it might, according to the true construction of the will, be exercised during the life of any child of E. whether alive at the testatrix's death or born afterwards, and was therefore avoided by the rule against perpetuities.

Held, (4.) that there were two powers vested in the trustees for the time being of the will, first to pay either capital or income to E., which was only capable of being exercised during his life, and secondly a power to apply either capital or income for the benefit of E., his wife or children, which was capable of being exercised beyond the period allowed by law, and that the former power must be upheld and the latter rejected.

THE Countess Marie Cecile de Sommery by her will, dated July 16, 1897, appointed Louis Charles Coelenbier and Amand Debard executors. After certain specific and pecuniary legacies the will proceeded as follows: "I devise and bequeath all the real and residuary personal estate, except my shares in the Canal du

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Midi, of which I shall have testamentary power of disposition at my decease unto the said Louis Charles Coelenbier and Amand Debard (hereinafter called 'my trustees'), upon trust for sale, and upon trust to stand possessed of the net proceeds of such sale, and the unconverted part of my estate for the time being (together hereinafter called 'my trust fund'), after payment of my debts and funeral and testamentary expenses, upon trust" to pay a certain charitable legacy, "and upon trust to divide the residue of my trust fund into thirteen equal parts," and as to eleven of such parts upon the trusts therein declared, "and as to two other of such parts, upon trust to pay the capital or income thereof, or neither, to my nephew the said Eugene de Sommery, or to apply the capital or income thereof, or any part of either for his benefit, or for the benefit of his wife or any child or children of his, as my trustees may in their absolute and uncontrolled discretion consider desirable, and subject thereto, to pay any capital or income which may remain in their hands under this trust, to such of my nephews and nieces, and in such shares as my trustees may think proper. I devise and bequeath all my twenty-one shares in the Canal du Midi to my trustees, upon trust in their absolute and uncontrolled discretion to sell or retain the same," and to hold the same or the proceeds thereof upon certain trusts, some of which were afterwards declared to be void for remoteness, but some of which were valid.

Seven of the shares, or the proceeds or investments thereof, were to be held upon trust to pay thereout twenty-two pecuniary legacies, free of legacy duties, and the residue of the proceeds of these seven shares was given upon trust for the testatrix's niece Beatrice de Sommery absolutely.

The testatrix died on April 26, 1899, domiciled in England, and was at her death entitled to the twenty-one shares. Shortly after her death the trustees sold four of the shares, and applied the proceeds in paying a legacy charged by the will on seven of the shares. In completing their title according to French law, the trustees paid certain sums claimed by the French Government by way of succession duty, and in so doing, and also in connection with the realization of the shares in question, they incurred certain costs.

Count Eugene de Sommery died on July 28, 1907, and no capital was applied for his benefit.

Coelenbier, the surviving executor and trustee of the will, took out an originating summons, to which the Countess Beatrice de Sommery (claiming to be beneficially interested in the investments representing certain of the shares in the company called the Canal du Midi), Marie Louise Onraet (claiming to be interested in the residuary estate), and Countess Marie Therese de Sommery (claiming to be beneficially interested in the income of the investments representing five of the shares in the Canal du Midi) were defendants, raising, amongst others, the questions (1.) whether the succession duties paid to the French Government on the death of the testatrix in respect of the twenty-one shares in the Canal du Midi ought to be raised and paid out of the investments representing such shares, or out of the residuary estate, or how otherwise the same should be provided for; and (2.) whether the costs incurred by the executors and trustees in relation to the payment of the succession duty and the realization and getting in of the shares and interest of the testatrix in the Canal du Midi ought to be paid out of the proceeds of such shares and interest, or how otherwise.

The summons was adjourned into Court and heard by Parker J. on June 19, 1912.

There was evidence that, according to French law, an executor would have no right, as against a specific legatee, to be put into possession of specifically bequeathed property.

H. F. F. Greenland, for the plaintiff, stated the facts and the questions involved.

L. W. Byrne, for the Countess Beatrice de Sommery. The French succession duty is payable out of the residue and does not fall on the shares which are the subject of the specific gift. This is a case where the will is an English one, the testatrix was domiciled in England, and the shares are movable property by the law of France. The text-books support the argument that the duty is payable out of residue. In Theobald on Wills, 7th ed. p. 802, there is the following passage: "The costs of administration include the costs of getting in any part of the real

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and personal estate which is in a foreign country, and the payment of all duties necessary for that purpose." The authorities cited for that proposition are *Peter* v. *Stirling* (1) and *In re Maurice.* (2)

In Hanson's Death Duties, 6th ed. p. 157, it is stated that "foreign duties on personal property of the deceased situated abroad—such as French rentes—are payable, in the absence of a direction to the contrary, out of residue (*Peter* v. *Stirling* (1)), and the fact that property of this nature had been specifically bequeathed would not, it is thought, make any difference." In Jarman on Wills, 6th ed. p. 2014, it is said that "testamentary expenses are expenses incident to the proper performance of the duty of an executor in connection with the personal estate, including the estate duty on property passing to the executor as such, the costs of proving the will, of obtaining legal advice as to the distribution of the estate, the expenses of ascertaining the persons entitled to a legacy or specific fund, and the expenses of getting in property abroad." There is there no specific mention of foreign duties, but the same two cases are cited in support of the last part of the passage. Where the assets of a testator domiciled in England were in part personal estate in the Colony of Victoria (where duty was payable on the property of all deceased persons), it was held that the duties in Victoria and all expenses of realization were payable out of the general estate before distribution, and that pecuniary legatees were entitled to their legacies free from the colonial duties and expenses: *Peter* v. *Stirling.* (1)

Where there is a specific gift of movables abroad, the executors must bring the asset to the legatee free from foreign duty.

Foreign like colonial duties are part of costs of realization and are therefore payable out of the testator's general assets before distribution: *In re Maurice.* (2) In *In re Brewster* (3) Swinfen Eady J. says that both that case and *Peter* v. *Stirling* (1) "were really contests between shares of residue." It is the primary duty of executors, where part of the property is abroad, to bring it into this country in a liquid form.

(1) (1878) 10 Ch. D. 279. (2) (1896) 75 L. T. 415.
(3) [1908] 2 Ch. 365, 368.

[PARKER J. It is the executors' duty to assent, and in the present case duties with reference to the shares were to be performed by the two persons appointed executors as trustees, and their only duty as executors was to assent to the gift to themselves of the shares.

Luxmoore, for the defendant Marie Louise Onraet, referred to *Sharp* v. *Lush* (1) and *In re Pearce* (2)]

In re Pearce (2) is inconsistent with *Sharp* v. *Lush*. (1) "It is the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise"; and the "expenses incurred in doing so must be paid out of the general estate, as part of the expenses of the administration": Williams on Executors, 10th ed. p. 1178, citing *Perry* v. *Meddowcroft*. (3)

The costs ought also to be borne out of the general estate.

Luxmoore, for the defendant Marie Louise Onraet. It is submitted that the French duty is payable out of the specifically bequeathed shares and not out of the general estate: *In re Brewster*. (4)

The costs should also be borne by the shares and not paid out of the general estate.

C. J. Mathew, for Countess Marie Therese de Sommery.

L. W. Byrne, in reply, referred to Hanson's Death Duties, 6th ed. p. 190.

Cur. adv. vult.

July 31. PARKER J. In this case the testatrix by her will, dated July 16, 1897, bequeathed all her twenty-one shares in a French company known as the Canal du Midi to her trustees, upon trust at their discretion to retain or sell the same, and to hold the same or the proceeds thereof upon certain trusts, some of which were, by an order dated October 21, 1908, declared to be bad for remoteness, but some of which are valid. The testatrix died on April 26, 1899, domiciled in England, and was at her death entitled to the twenty-one shares in question. Shortly after her death the trustees sold four of the shares and applied the proceeds in paying a legacy charged by the will on

(1) (1879) 10 Ch. D. 468.
(2) [1909] 1 Ch. 819.
(3) 4 Beav. 197, 204.
(4) [1908] 2 Ch. 365.

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seven of them. The trustees were also executors, and must therefore, as such, have assented to the gift of the twenty-one shares to themselves. After such assent they were entitled to the shares as trustees and not as executors. In completing their title according to French law they have paid certain sums claimed by the French Government by way of succession duty, and in so doing, and also in connection with the realization of the shares in question, have incurred certain costs.

The question I have to determine is whether this duty and those costs ought to be borne by the proceeds of the shares in question or by the residuary estate. In my opinion, they ought to be borne by the proceeds of the shares in question. With regard to the French succession duty, I should have thought this clear even without authority, but the case of *In re Brewster* (1) seems to be a decision to that effect.

With regard to the costs, they were, in my opinion, all costs incurred in carrying into effect the trusts of the twenty-one shares, and not costs of the general administration. They should, therefore, be borne by the property in respect of which they were incurred, and not by the estate generally. Even costs incurred in respect of a specific gift before the assent of the executors are, sometimes at any rate, chargeable against the property the subject of the gift: see *In re Pearce.* (2) The only difficulty is occasioned by the case of *Perry* v. *Meddowcroft* (3), in which a testator is stated to have specifically bequeathed some costs due to him, and it was held that the expense of recovering the costs was payable out of the residue. This might well be right if the subject-matter of the specific gift were the amount the executors should recover, but if the specific gift was, according to the true construction, a gift of the right to sue for the costs, I doubt the correctness of the decision. I cannot think that where there is a specific gift of a right of action the costs of legal proceedings to enforce the right are payable out of residue.

In the present case there is a further reason for holding that the costs in question are not payable out of residue. The twenty-one shares were foreign assets which did not vest in the

(1) [1908] 2 Ch. 365. (2) [1909] 1 Ch. 819.
(3) 4 Beav. 197.

executors virtute officii, and the evidence is that, according to French law, an executor would have no right as against the specific legatee to be put into possession of specifically bequeathed property.

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Subsequently another person, Antoine de Sommery, claiming to be interested in the residuary estate, was added as a defendant, and the summons was amended so as to raise the further question whether, and if so to what extent, the trusts in the will declared concerning two thirteenth parts of the residuary estate for the benefit of Count Eugene de Sommery, his wife and children, were void for remoteness or otherwise, and, if so, whether such parts ought to be held in trust for next of kin of the testatrix, or how otherwise.

This question was argued on October 18, 1912.

L. W. Byrne, for Countess Beatrice de Sommery. The trust in favour of Eugene de Sommery, his wife and children, is void altogether, and on two grounds—(1.) because the power or trust might be exercised or executed by persons not within the limits of the rule as to perpetuities; and (2.) because the persons taking beneficially under that exercise or execution might not be within the limits.

The power is not given to the original trustees only. Where a testator appointed his wife, his brother, and a friend executors and trustees of his will, and gave to "my said trustees" all his estate, upon trust for his wife for life, "with full power to my said trustees" to sell and apply the proceeds for his wife's benefit for life, Farwell J. held that the power was not personal to the trustees named, but was annexed to the office, and could be exercised by the trustees or trustee for the time being: *In re Smith.* (1)

Where a power or discretionary trust is given in favour of a man and his wife and children, and is not limited to the life of the man, it is void for remoteness: *In re Blew.* (2) In this case the power or trust is exercisable during the life of any child of Eugene de Sommery, whose life might last more than twenty-one

(1) [1904] 1 Ch. 139. (2) [1906] 1 Ch. 624.

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years after Eugene's death, and that, according to the case lastly cited, is a trust which might be exercisable at a time beyond the period allowed by the rule against perpetuities. [He also referred to *In re Hargreaves.* (1)]

C. J. Mathew, for the defendants Countess Marie Therese de Sommery and Antoine de Sommery: There is never a time when you cannot find a trustee. Here the power, so far as the persons to exercise it are concerned, is either, on the construction of the will, personal to the two persons named in the will, or may be construed as two powers, one to be exercised by the trustees so named, and the other by any succeeding trustees, in which case the former power is valid: *Attenborough* v. *Attenborough.* (2)

The same case shews that a power is not bad because it contemplates an appointment to objects some of whom are too remote, but that a valid appointment may be made thereunder to such of its objects as are within the proper limits.

Limitations in default of appointment under a power void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities: *In re Abbott.* (3)

In *In re Blew* (4) the limitation was treated as a trust and not as a power.

Luxmoore, for Marie Louise Onraet, referred to Gray on Perpetuities, 2nd ed. p. 376, pars. 473, 475.

[Jarman on Wills, 6th ed. p. 308; Farwell on Powers, 2nd ed. pp. 9, 452; and *Earl of Bandon* v. *Moreland* (5) were also referred to.]

Cur. adv. vult.

Nov. 4. PARKER J. A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void; but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule.

(1) (1890) 43 Ch. D. 401.
(2) 1 K. & J. 296.
(3) [1893] 1 Ch. 54.
(4) [1906] 1 Ch. 624.
(5) [1910] 1 I. R. 220.

If a power be given to a person alive at the date of the instrument creating it, it must, of course, if exercised at all, be executed during his life, and is therefore valid. Again, if a power can be exercised only in favour of a person living at the date of the instrument creating it, it must, if exercised at all, be exercised during the life of such person, and is therefore unobjectionable. Further, the instrument itself may expressly limit a period, not exceeding the legal limits, for the exercise of the power. Lastly, where the settlor has used language from which the Court may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the Court will avoid the latter only and will give effect to the power which is not open to this objection. Thus, although a power vested in the trustees for the time being of a settlement has, so far as I can discover, been uniformly looked on as a single and indivisible power, it may be otherwise if the power be limited to A. and B. or other the trustees of the settlement for the time being. In this case the Court may treat the settlor as having created one power vested in A. and B. while trustees, and a distinct power vested in their successors, in which case the power vested in A. and B. would be open to no objection on the ground of remoteness: *Attenborough* v. *Attenborough*. (1)

In the present case the testatrix devised all her real and residuary personal estate to two named persons, thereinafter called her "trustees," upon trust for sale, and, after payment of her debts and funeral and testamentary expenses and a certain charitable legacy, to divide the proceeds into thirteen parts, and, as to two such parts, to hold the same, upon trust to pay the capital and income thereof, or neither, to her nephew Eugene de Sommery, or to apply the capital or income thereof for his benefit, or for the benefit of his wife or any child or children of his, as her trustees should consider advisable, and, subject thereto, to pay any capital or income which might remain in their hands under that trust to such of her nephews and nieces, and in such shares, as her trustees should think proper. In my opinion, the power or powers thus created in favour of

(1) 1 K. & J. 296.

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DE SOMMERY, *In re.* COELENBIER *v.* DE SOMMERY.

Eugene de Sommery, his wife and children, are conferred on the trustees of the will for the time being, and not on the original trustees only (see *In re Smith* (1)); and this being so, there is, I think, no possibility of applying the principle of *Attenborough* v. *Attenborough*. (2) Further, if there be one power only vested in these trustees, it is fairly obvious that it may, according to the true construction of the will, be exercised during the life of any child of Eugene de Sommery, whether alive at the testatrix's death or born afterwards, and would therefore be avoided by the rule against perpetuities. I have come to the conclusion, however, that there are in fact two powers vested in the trustees for the time being of the will—first, a power of paying either capital or income to Eugene de Sommery, which is only capable of being exercised during his life, and, secondly, a power of applying either capital or income for the benefit of Eugene de Sommery, his wife or children, which is capable of being exercised beyond the period allowed by law. I see no reason on principle which precludes me from upholding the former and rejecting the latter power.

Solicitors: *Le Brasseur & Oakley, for Stone, Thomas & King, Bath; Fooks, Chadwick, Arnold & Chadwick.*

(1) [1904] 1 Ch. 139. (2) 1 K. & J. 296.

F. E.

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C. A.
1912
JOYCE J.
May 2, 3, 7, 11.
C. A.
July 9, 10, 16.

[1912 T. 596.]

Highway—Dedication—Building Estate—Deposited Plan—Proposed Road and Footpath—Intention—User by Public—Extent of Dedication—Adjoining Owner—Right of Access to Highway.

The defendant laid out and developed his property as a building estate in accordance with a plan submitted to and approved by the plaintiffs. The plan shewed a proposed road bounded on the north by the boundary fence of the plaintiffs' park, and having, on either side of it, dotted lines indicating intended footpaths forming part of the road, which, in accordance with the by-laws, was of the total width of forty feet. The defendant built houses on the southern side of the road overlooking the plaintiffs' boundary fence and made up and metalled the road for one half of its width next to the houses. The further or northern half of the road next to the plaintiffs' fence was left unmetalled and untouched. The defendant subsequently removed the hoarding from the end of the road, and the evidence shewed that for some three years before action brought the road, which connected two public highways, had been uninterruptedly used as a thoroughfare by pedestrians, cyclists and vehicular traffic unconnected with residents in the road, the metalled part being used in preference to the unmetalled part.

The plaintiffs had recently opened a gate in their boundary fence and were carting building materials across the unmetalled portion of the road and the part intended to be appropriated for a footpath. The defendant objected on the ground that the unmetalled portion was not subject to any public right of way and that, even if it were, the plaintiffs were not entitled to take their carts over the part appropriated solely for the purposes of a footpath:—

Held, affirming the decision of Joyce J.:—

1. That the intention indicated by the deposited plan to make and dedicate a public highway had been completed by the subsequent uninterrupted user of the road by the public, and that there had been a dedication not merely of the metalled portion but of the whole width of the road as a highway for all purposes, notwithstanding the proposed appropriation of part of it as a footpath for the convenience of the public generally; and

2. That the plaintiffs, having, as adjoining owners, a private right attached to their property to gain access to the highway, were entitled at reasonable times and to a reasonable extent to cross on foot or with vehicles the portion of the highway appropriated for a footpath.

In 1902 the plaintiffs purchased for the purposes of a public park certain property known as Downhills Park, Tottenham, the

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southern boundary fence of which abutted on to the northern side of adjoining property purchased by the defendant in the same year.

In February, 1905, the defendant in accordance with the local by-laws deposited with the plaintiffs' engineer a plan and sections for laying out the defendant's property as a building estate. The plan and sections were subsequently approved by the plaintiffs, and, so far as material for the purposes of this report, shewed an intended road, Keston Road, running from Philip Lane, on the south, in a northerly direction for a considerable part of its length and then turning sharply towards the east and running into an existing road called Downhills Park Road. Both Philip Lane and Downhills Park Road were public highways repairable by the inhabitants at large.

This eastern portion of Keston Road comprised the northern part of the defendant's property and throughout its entire length abutted on to the plaintiffs' southern boundary fence of Downhills Park. It was of the width of forty feet as required by the plaintiffs' by-laws, but the defendant alleged that between the northern boundary of the eastern portion of the road and the southern boundary fence of Downhills Park there was left a narrow strip of land varying from one to three inches, which strip was not intended to form part of Keston Road and which he intended to reserve for himself. The plaintiffs denied the existence of any such reserved strip. The deposited plan shewed by dotted lines that there was to be a footpath about seven feet wide on each side of the forty-foot road, but did not indicate any reserved strip.

Houses had been built upon most of the land on either side of that portion of Keston Road which ran from south to north. In 1909 part of this portion was taken over by the plaintiffs as a highway repairable by the inhabitants at large. A large part of the remainder of this portion had been channelled, kerbed, and paved by the defendant.

Houses had also been built upon most of the land on the southern side of the eastern portion of Keston Road facing Downhills Park, which portion throughout for the half of its width immediately adjoining the houses had been also channelled,

kerbed, and paved by the defendant. The further or northern half of this portion had been left by the defendant not made up or metalled inasmuch as he sought to throw the expense of making it up upon the plaintiffs, and had refused their offer to make it up with material of which he did not approve. Upon completion of the houses in September, 1908, the hoarding or fence at the easternmost end of this portion was removed by the defendant, and thenceforward there was nothing to prevent the public from having access to this portion of Keston Road.

The plaintiffs had recently entered into a contract for the erection of schools on certain land belonging to them and lying to the west of the plaintiffs' land on the western side of the portion of Keston Road running from south to north. Negotiations for the purchase by the plaintiffs from the defendant of part of his vacant land on the west side of this portion of Keston Road so as to afford access to the plaintiffs' school site had proved unsuccessful, and in order to enable their contractor to cart the necessary materials to the school site the plaintiffs made temporary gates in their fence separating Downhills Park from the northern side of the eastern portion of Keston Road and agreed to allow the contractor to cart the materials from Keston Road through the gates and over a strip of Downhills Park to the school site. This he did for some days until the defendant objected on the ground of trespass on his private road and on his reserved strip of land. After some correspondence between the defendant and the plaintiffs the defendant erected a wire fence over and along his alleged reserved strip of land and across the temporary gates which the plaintiffs had made. The plaintiffs caused this wire fence to be removed, but it was again erected by the defendant. The plaintiffs alleged that it was in fact erected on their land and not on land belonging to the defendant.

The plaintiffs then commenced this action claiming damages for trespass by the defendant on Downhills Park and for nuisance occasioned by the erection of an obstruction on their land or alternatively upon the public highway Keston Road so as to prevent their access to their land from the highway; a declaration that he was not entitled to erect or maintain such obstruction; and an injunction accordingly.

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The action came on for hearing before Joyce J. on May 2, 3, and 7, 1912.

At the trial evidence of user by the public for the last two or three years of the eastern portion of Keston Road was given. From this it appeared that while the user by the general public other than residents in Keston Road had not been of a very extensive nature, the road had nevertheless been used as a thoroughfare by pedestrians and cyclists as a short cut to the Tottenham Hotspur Football ground and to other places in the vicinity; that carters had used the road as a thoroughfare for carting purposes because it afforded an easier gradient for the horses; and that although the metalled southern side of the eastern portion of Keston Road was used by vehicular traffic in preference to the unmetalled northern side, yet that the latter had been used when necessity arose. There had been no attempt on the part of the defendant or any one else to stop such user by the general public.

Macmorran, K.C., and *Cartwright Sharp*, for the plaintiffs.
Younger, K.C., and *J. Scholefield*, for the defendant.

Cur. adv. vult.

May 11. JOYCE J. This is an action by the Urban District Council of Tottenham against the defendant Rowley. The writ claims damages for trespass, for nuisance by erecting an obstruction upon the public highway known as Keston Road in such a manner as to interfere with the use thereof by the plaintiffs, their contractors and servants, a declaration that the defendant is not entitled to erect or maintain any obstruction so as to impede the plaintiffs from entering on their land from the highway or entering on the highway from their land, and an injunction to restrain the erection of any such obstruction.

Keston Road is a road or street or intended street, recently made or set out (speaking in a popular sense) and turning to the west out of Downhills Park Road, that is so far as the portion in question here is concerned. The land north of Keston Road belongs to the plaintiffs; it is used as a public park and is separated from Keston Road by a wooden pale fence erected some years

ago by the plaintiffs on the edge of their land, or practically so. The plaintiffs some time ago removed a portion of this fence so as to allow of ingress and egress through the opening thus made to and from their land, this being wanted for the purpose of conveying material in connection with the building by them of a new school on their land at some little distance from the road. This the plaintiffs were perfectly entitled to do if Keston Road be a public highway. I need not refer to the cases; they are in Theobald's Law of Land, p. 51. The defendant, however, thought that he could compel the plaintiffs to purchase a road from him, and he put up, as explained in paragraph 16 of his affidavit, a wire fence in front of the opening made by the plaintiffs; his justification for doing this being the allegation that Keston Road was a private road (whatever that may mean) and that he owned a narrow strip of land between the road and the plaintiffs' fence.

The defendant had some time before purchased the tract of land south of and up to this fence that I have mentioned, and the site of the portion of Keston Road in question is part of what he purchased. He laid out this land as a building estate, and now practically it is all built upon except what has been appropriated —I use that word without prejudice—for roads or streets, the south of Keston Road, the portion in question, being built upon, leaving a roadway between the houses and the fence. That Keston Road, including this piece of roadway, was intended at some time or other to be a street, whatever may be the meaning of that expression, appears by, among other things, the plan deposited by the defendant with the plaintiffs on February 3, 1905, under section 107 of the council's by-laws, and that plan was approved and sanctioned by them.

When the land on the south side of this road or street had been built upon—I am speaking always of this portion in question—namely in September, 1908, the hoarding or fence at the eastern end of the road was removed by the defendant, and this road or street, or whatever it ought to be called, was thrown open to the public, and it has ever since been used, not only by people on foot and cyclists, but for vehicles, by the public as a thoroughfare; not a very extensive use in this way I admit, but

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it has been so used by any and every one who pleased to use it, and there has never been any thought or idea on the part of the defendant of excluding the public therefrom. The other end of Keston Road has been taken over by the plaintiffs, the local authority, so as to be repairable by them, but this has not been done with respect to the eastern portion now in question of Keston Road, although the road has been made up by the defendant except on the northern side next the plaintiffs' park; the making up of the north side the defendant left for the plaintiffs, the frontagers on that side, to do, and he intended, as he admits and as he told me, that this should be done by them, and, of course, that could only be as the frontagers on that side.

Now I think that the only real question which arises is whether Keston Road be a public highway or not; in other words, whether there has been a dedication by the defendant of Keston Road as a highway for public use. That is a question of fact, to establish which there must have been intention on the part of the defendant to dedicate, and user by the public accordingly.

Having first of all referred to that part of Pratt on Highways entitled "Dedication of Highways," in order to inform or direct myself in considering the effect of the evidence, which is somewhat conflicting,—although upon the question of the user of the road by the public I think more weight must be given to the evidence of those who say they have seen such user than to those who say they have not—I come to the conclusion that upon the balance of the evidence there had been such a dedication before the present dispute, and that Keston Road, including the eastern end, the portion in dispute, was a public way as well for vehicles as foot passengers before the opening of the access thereto by the plaintiffs through their fence on the northern side.

At one time, as I have mentioned, it was contended that the defendant was owner of a strip between the road and the plaintiffs' fence and it was alleged that if there was a dedication a narrow strip some three inches in width on the north had been reserved by the defendant. That I think originally was the principal defence set up by the defendant, and he complained of trespass

by the plaintiffs upon this strip. This theory, however, of the defendant having reserved a strip was ultimately abandoned at the trial as it was found untenable, and then there was an attempt to make out, or rather I should say there was a suggestion, that even if the portion of Keston Road in question ever became a public highway a strip on the northern side to the width of seven feet or thereabouts had been dedicated to foot passengers only. There was not really any evidence to support this new and ingenious theory. The only possible ground for it was the fact of a dotted line appearing upon the plan which was deposited with the plaintiffs when the street was sanctioned. If the plan shews this it certainly shews an intention to dedicate the full width of forty feet up to the fence of the plaintiffs, and the seven feet on the north side would be subject, if there were any difference at all, to all the usual incidents of the footway or side walk in a street, including the use of the same when necessary for the crossing of vehicles to the land beside the road. But it is not the deposit of this plan that constitutes the dedication, and I hold this contention to be untenable.

Then because the south side of the roadway was made up by the defendant some time after the road had been thrown open to the public, cyclists, and vehicular traffic, naturally preferred the south side where the road was made up, and it was urged that the north side never had been used by the public for vehicles, and that it was the south side only that was dedicated to the public or became a highway, if at all.

I am of opinion that upon the facts proved no such distinction can be maintained. The defendant intended to dedicate the whole width to the public as a highway, and the user by the public has in my opinion been sufficient to complete such dedication.

Upon the whole, therefore, I think that the defence to this action fails, and the plaintiffs are entitled to succeed.

The defendant appealed. The appeal was heard on July 9 and 10, 1912.

Younger, *K.C.*, and *J. Scholefield*, for the appellant. The plaintiffs have no right to take wheeled traffic over this strip of

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land which has never been dedicated to the public. There is no evidence that it was dedicated at all, and it is certain that at most the dedication was for use as a footpath only.

This is a private street within ss. 103, 107, and 109 of the Tottenham Local Board Act, 1890 (53 & 54 Vict. c. ccxliv.), and under those sections and s. 150 of the Public Health Act, 1875, the urban authority have power to compel owners and occupiers of premises fronting on the street to make it up, but there is nothing in those sections which amounts to dedication. In this case the southern half of the road only has been made up, and this is a new private road as to which there is no presumption of dedication up to the hedges on each side. There are in fact no hedges or boundaries in this case.

Dedication can be proved by user and the extent of the dedication is shewn by the user. It is a question of intention on the part of the owner of the soil. A road is not necessarily public because it is laid out, made up, and used. The local authority cannot take it over without the consent of the owners, even though it may have been repaired at the public expense: *Woodyer* v. *Hadden*. (1) It must be proved that the road has been in fact thrown open to the public and used by them: *Ramuz* v. *Southend Local Board* (2); *Attorney-General* v. *Biphosphated Guano Co.* (3); *Rex* v. *Lloyd* (4); and the animus dedicandi must also be proved: *Attorney-General* v. *Esher Linoleum Co.* (5)

In this case there has not been such a user of the northern part of this road not yet made up as to justify the finding of the judge in the Court below that there had been a dedication of it. We do not contend that the metalled part of the road is not a highway, but we say that the unmetalled part is not a highway.

The plaintiffs' fence was made independently of and long before the road, and, therefore, the presumption which arises in cases where the fence is made with reference to the road, namely, that the dedication extends right up to the fence, has no application here, for the mere existence of fences on either side of a highway

(1) (1813) 5 Taunt. 125.
(2) (1892) 67 L. T. 169.
(3) (1879) 11 Ch. D. 327, 340.
(4) (1808) 1 Camp. 260.
(5) [1901] 2 Ch. 647, 650.

is not conclusive: *Countess Belmore* v. *Kent County Council* (1); *Offin* v. *Rochford Rural Council.* (2) Here the facts are known and prevent any presumption. User is the test, and unless it be shewn that the public have taken to the road and used it as a highway it does not become a highway: per Brett J. in *Cubitt* v. *Lady Maxse.* (3)

User by the public of the unmetalled part has not been proved and therefore there is no presumption of dedication. The user of the metalled part does not assist the plaintiffs.

Further, assuming that this eastern portion of Keston Road is a highway, a seven-foot strip was left for a footpath and the defendant can prevent the plaintiffs from using it for purposes beyond the dedication. The dedication, if any, was for foot passengers only, and the defendant can maintain trespass against any one taking vehicles over it. The converse of that proposition has been laid down, for dedication by an owner does not deprive him of rights not inconsistent with user by the public for the purposes for which the dedication was made: *St. Mary, Newington* v. *Jacobs.* (4) There is no authority shewing that a highway dedicated for one purpose can be used for some other purpose. Where there has been dedication for the purposes of a footway only and nothing more, the only right which an adjoining owner has is to come on that highway for that purpose only.

If the deposited plan shews any dedication at all, it is for a footpath only, and the plaintiffs have no authority to alter that limited dedication: *Robertson* v. *Bristol Corporation.* (5) The power to determine the kind of user is with the person sending in the building plans.

Macmorran, K.C., and *Cartwright Sharp*, for the respondents. There has been a dedication of the whole of this highway for all purposes. The footpath is only for the sake of convenience, and the right of way for all purposes still exists over the entire width of the road notwithstanding the appropriation of a strip for a footway.

(1) [1901] 1 Ch. 873, 877.
(2) [1906] 1 Ch. 342.
(3) (1873) L. R. 8 C. P. 704.
(4) (1871) L. R. 7 Q. B. 47.
(5) [1900] 2 Q. B. 198.

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An adjoining owner has a right of immediate access from his property to a public highway, and such a right is a private right, distinct from his right to use the highway itself as one of the public: per Lord Selborne in *Lyon* v. *Fishmongers' Company*. (1)

[They were stopped by the Court.]

Cur. adv. vult.

July 16. COZENS-HARDY M.R. This is an appeal from a judgment of Joyce J., who has in effect decided that the north part of Keston Road is a public highway and that the plaintiffs, as owners and occupiers of land to the north and east of and immediately abutting upon the highway, are entitled to access from their land on to the highway.

The general principle has not been questioned that the owner, of land abutting upon a highway has a right to get upon the highway from his own land, but it is urged that the part of Keston Road in question is not a highway at all, or at least that the northern half of that road which has not been paved and made up is not a highway.

Now it appears from the plan with reference to which the argument has been conducted that this portion of Keston Road leads from one highway, namely, Downhills Park Road, to another highway, namely, the western part of Keston Road. The soil of Keston Road throughout belongs to the defendant, who in 1902 purchased a property of considerable extent and laid it out as a building estate. In 1905 he submitted plans to the local authority, which plans have been substantially carried into effect. A large number of houses have been built upon the property, including houses on the south side of that part of Keston Road which is in question in this action.

An attempt was made at one time to make out that the defendant had reserved a narrow strip next Downhills Park, which strip was, therefore, no part of the intended highway, but that case broke down and it is not now raised by the appellant.

The appellant says, and with truth, that the mere intention indicated by the deposited plan to make and dedicate a public

(1) (1876) 1 App. Cas. 662, 684, 685.

highway is not sufficient by itself; there must be subsequent acts sufficient to establish that his intention has been carried into effect. Now the learned judge, who heard and saw the witnesses, has held that there has been such a user by the public, with the knowledge and consent of the defendant and without any attempt at interference, as sufficed to establish "that there had been such a dedication before the present dispute, and that Keston Road, including the eastern end, the portion in dispute, was a public way as well for vehicles as foot passengers before the opening of the access thereto by the plaintiffs through their fence on the northern side." I am satisfied that the evidence justifies this finding and I do not think we ought to interfere with it.

The defendant on the appeal did not challenge the finding so far as the southern half of the road is concerned, namely, the part adjacent to the houses built by himself, which part has been made up and paved by the defendant at his own expense, but he urged that there is no evidence of dedication of the other or northern part of the road. I am unable to follow this argument. The road which was dedicated to the public was the entire road. No doubt it is true that both for vehicles and for foot passengers the greater convenience of the paved southern part of the road would induce members of the public to pass along that part rather than upon the unpaved northern part. The oak paling on the north side of the road erected by the plaintiffs on their own land is the northern boundary of the road. The plan shews this, and the photographs which have been put in render this still more apparent. I have therefore no hesitation in negativing the suggestion of a partial dedication. I think it must be a dedication of the whole or none, and I am satisfied that the latter alternative would do great injustice. I hold, therefore, that the highway extends quite up to the plaintiffs' paling.

I may observe that the reason why the defendant did not make up and pave the northern half of the road was because he desired to throw the expense upon the plaintiffs as the owners of the adjoining property, and so far as I can make out this was his only reason.

Another point was made that the plan deposited shewed an intention to have a footpath on each side of the forty-foot road

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and that this is required by the local by-laws, and that the plaintiffs gave no right to cross the path by vehicles from adjacent land into the main roadway. In the first place, there is in fact no footpath on the north side of Keston Road, so that the question does not really arise. In the next place, the owner of adjoining land has a private right attached to his property to gain access to the highway. This is a right which must be reasonably exercised so as not to interfere with the reasonable exercise by the public of their rights of way. But I cannot hold that the mere fact that there may be a footpath at some future time adjoining the plaintiffs' property disentitles the plaintiffs at reasonable times and to a reasonable extent to cross the footpath, which is very different from driving along the footpath. Any other view would lead to absurd consequences. Cannot the owner of a suburban villa cross the footpath on a bicycle or take his pony cart to a stable at the side or the back of his house? In my opinion the rights of the public are subject to the reasonable exercise by the adjacent owner of his private rights. It is not open to the defendant to say "I intended to dedicate to the public without giving any right to the adjoining owner." Such a qualified dedication, if it be possible in law, which I doubt, must be established by clear evidence, and no such evidence is forthcoming in the present case.

I may add that s. 62 of the Tottenham Local Board Act, 1890 (1), seems to recognize and at the same time to regulate the right to cross a kerbed footpath. And as the plaintiffs are

(1) Sect. 62 of the Tottenham Local Board Act, 1890 (53 & 54 Vict. c. ccxliv.), provided: "Every person desirous of forming a communication for horses or vehicles across any kerbed footpath so as to afford access to any premises from a street shall first give notice in writing of such desire to the Local Board and shall if so required by them submit to them for their reasonable approval a plan of the proposed communication showing where it will cut the footpath and what provision (if any) is made for kerbing for gullies and for a paved crossing and the dimensions and gradients of necessary works and the Local Board shall execute the works at the expense of the person making the application and if any person drives or permits or causes to be driven any horse or vehicle across any footway unless and until such a communication as aforesaid has been so made he shall for each such offence be liable to a penalty not exceeding forty shillings."

themselves the local board they can do what is necessary to comply with s. 62.

In my opinion the judgment of Joyce J. was right and this appeal must be dismissed with costs.

FARWELL L.J. In 1905 the plaintiffs duly approved the plan deposited with them by the defendant for laying out his building estate in their district, and the defendant duly carried out the same. The plan shews amongst other things Keston Road running from south to north and then turning east and running from west to east. So much of it as runs from south to north has been not only completed, but part of it has been actually taken over by the local authority. The rest of the road has houses (belonging to the defendant) built along the south side and all completed. The land on the north side belongs to the plaintiffs and is unbuilt on.

The road itself was laid out by the defendant and has a wooden fence on the north side, and one half of it has been made up by the defendant. He has requested the plaintiffs as adjacent owners to make up the other half, but refused to accept their proposal to make a gravel instead of a flagged footway, and this half is still unmetalled. The road itself forms a connection between two public roads; the unmetalled portion having been used just so much as is necessary for the full enjoyment of the metalled half by carts passing one another and the like, and also by any one who chose to go there, without objection or complaint by the defendant.

Joyce J. has found as a fact that the whole of Keston Road from east to west has been dedicated to the public by the defendant and used by them accordingly. No appeal is brought against this so far as regards the southern half, but it is said that the finding as to the other half cannot be supported. The road connects two public highways and has houses on one side. The whole width of it is not more than enough to comply with the requirements of the local by-laws: the half would not suffice. It was laid out with the intention of dedicating it to the public as an entire road—not as half a road. The delay in completing the metalling has not arisen from any change of purpose, but because

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of a dispute about the materials to be used in such completion: no one suggests that the whole road will not or may not be completed.

Several cases were cited to us, but they are of little if any assistance to the appellant. The law is well settled. I take it as stated by Blackburn J. in *Easton* v. *Richmond Highway Board*. (1) He says: "In the first place a highway may exist which is not metalled road at all; but generally a part is metalled, and a part left which is not hard road; and in general when the highway is between two fences all the ground that is between the fences is presumably dedicated as highway, unless the nature of the ground or other circumstances rebut that presumption." We are not dealing here with a road across the waste of a manor, but with a street of a town, and there is nothing to rebut this prima facie presumption—on the contrary, although the houses are on one side only, I think Chambre J.'s statement in *Woodyer* v. *Hadden* (2) is very appropriate to the present case. He says: "I am of opinion that this land is a public highway; it is a street, and a street is laid down to be a highway"; and a little lower down he says: "No particular time is necessary for evidence of a dedication: it is not, like a grant, presumed from length of time. If the act of dedication be unequivocal, it may take place immediately: for instance, if a man builds a double row of houses, opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway." It would be to impute an absurd intention to the defendant and one certainly not suggested by himself in his evidence if we were to hold that he intended to dedicate one half of the road only. In my opinion Joyce J. was quite right in his conclusion.

Then Mr. Younger took another point. He said, and said truly, that the dedication of land as a footpath does not justify its user for horses or wheel traffic: admitting this road to have been dedicated as found by the judge, he contends that the dedication is only in accordance with the plan, and that shews a strip on the northern boundary as a footpath, and that the plaintiffs cannot therefore justify crossing this strip with carts and horses.

(1) (1871) L. R. 7 Q. B. 69, 75. (2) 5 Taunt. 125, 137.

The fallacy underlying this argument is this: the extent of the dedication is a question of intention: it is one thing to dedicate a footpath and nothing else: it is quite another thing to dedicate a piece of land as a highway with a footpath on one side of it. In this case the intention is obviously to dedicate the whole piece of land as a street for all purposes, and although it is contemplated that a portion of it will be appropriated for foot passengers, the intention is that such appropriation, partly as footpath and partly as carriage road, shall continue at the discretion of the highway authority for the time being in the usual way with the usual powers to make such alterations as may from time to time prove necessary for the convenience of the inhabitants and the public generally. But the dedication is for all purposes. If it were not so, no openings could be made for carriage drives, no coach-houses with entrances from the road could be added to the houses, and the street itself could not be widened.

This appeal should be dismissed with costs.

KENNEDY L.J. I do not think that there is any ground upon which the judgment of Joyce J. in this case can be successfully impugned, and having read the judgment prepared by the Master of the Rolls, with which my own view entirely accords, I desire to add but very little in stating my agreement with the decision in the Court below.

The first point taken by the learned counsel for the appellant is that the learned judge had no evidence, or no sufficient evidence, to justify his finding that the portion of Keston Road which immediately adjoins the plaintiffs' land forms part of a highway. I am of opinion that there was. It was further contended that even if the land in question formed part of a highway it was a highway with a footway constituting a track especially for pedestrians, running along the side upon which the plaintiffs' property abuts, and that the plaintiffs were therefore not entitled to get access by passing out of or on to their land over the site of the footway. In fact there is no footway. But supposing that there was, I am of opinion that the plaintiffs as owners of land immediately adjoining the highway would be entitled to cross the footway with vehicles, provided always that

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they used the right of access to and out of the highway reasonably and without doing damage to or interfering with pedestrian traffic, not travelling along it with any vehicle, but merely crossing it so as to get to or from their adjacent land from or into the part of the road used especially for vehicular traffic.

Solicitors: *H. E. & W. Bury; Howard & Shelton, for Francis Shelton, Tottenham.*

R. M.

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In re McKERRELL.
McKERRELL *v.* GOWANS.

[1912 M. 1362.]

Joint Tenancy—Chose in Action—Policy of Assurance—Premiums paid by one Joint Tenant at Request of the other—Set-off—Equity—Lien—Assignment by one Joint Tenant—Effect.

In 1892 the plaintiff and her husband effected in their joint names a policy of assurance on their joint lives to be payable upon the death of whichever of them should first die. They had previously agreed that each should pay one half of the annual premiums, and in some years the premiums were so paid, but the husband from time to time became unable to pay his moiety, and then the plaintiff at his request paid it for him out of her own moneys. They both concurred in creating charges upon the policy, and subsequently the husband executed a deed of assignment for the benefit of his creditors, assigning all his property, but not specifically mentioning the policy, to the defendant as trustee. No notice of this deed was given to the insurance company. At the time of the husband's death the aggregate of the premiums paid by the plaintiff on his behalf exceeded in amount one moiety of the balance of the policy moneys remaining after payment of the joint charges.

Upon a summons to determine the respective rights and interests of the plaintiff and defendant:—

Held, that, the plaintiff being the legal owner of the policy, the defendant, whose only claim was in equity, must do equity; and that the plaintiff was entitled to set off her claim against her husband for the portion of the premiums paid on the policy by her at his request.

Held, further, that the plaintiff, one of the joint owners of the policy, having paid premiums at the request and on behalf of the other co-owner, was, in the circumstances, entitled to a lien on the policy moneys for the premiums so paid by her.

Quære whether in the circumstances the deed of assignment transferred or conveyed to the defendant any interest whatever, either

legal or equitable, in the policy or the moneys thereby secured, although, *semble*, it might have passed to the defendant the right to all the policy moneys if the husband had survived the plaintiff.

ADJOURNED SUMMONS.

This was a summons by the plaintiff, the widow of Robert Mure McKerrell, against the defendant, the trustee under a creditors' trust deed executed by her late husband, for the determination of the questions whether certain policy moneys secured by a policy taken out in the joint names of the husband and wife upon their joint lives and which became payable on the death of the plaintiff's husband belonged (subject to certain charges thereon) wholly to her or to her and the defendant in equal shares, and in the latter event whether the plaintiff was entitled to a charge on the policy moneys for the premiums paid by her on behalf of her late husband.

The facts were as follows:—

In 1892 the plaintiff and her husband agreed to take out a policy upon their joint lives and each of them was to pay one half of the annual premiums. Accordingly, in that year, they effected with the Pelican Life Insurance Company a policy of assurance in their joint names for the sum of 1000*l.* upon their joint lives to be payable at the death of whichever of the lives assured should first die, on the happening of which event the company agreed with the assured to "pay the sum assured to the assured their executors administrators or assigns or to other the person or persons legally entitled thereto." The yearly premium was 54*l.* 1*s.* 8*d.*

Pursuant to their agreement, the plaintiff and her husband for eight out of the nineteen years between 1892 and 1910 paid one moiety each of the yearly premiums on the policy, but in nine other of those years the husband's financial position was such that he was unable to pay his moiety, and on each of those occasions he requested the plaintiff to pay the whole premium, which she did, but at different times had to sell her jewellery and other personal effects to enable her to make the payments. In 1903 the husband paid the whole premium; and in 1911 the plaintiff and her husband had to borrow the amount of the premium in order to pay it.

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By a trust deed in Scottish form dated October 31, 1910, the plaintiff's husband assigned, disponed, conveyed and made over to the defendant as trustee for the benefit of the husband's creditors "all and sundry lands and other heritages household furniture goods and effects debts and sums of money and whole other estate of every description heritable and recoverable real and personal wherever situated belonging or owing" to him or which should "belong or be addebted" to him "during the subsistence of the present trust." The policy was not mentioned in the trust deed, and no notice of the deed of assignment was given to the insurance company.

The plaintiff's husband died on February 26, 1912.

The amount of the policy moneys payable in respect of the policy was 1327*l.* 10*s.*

The plaintiff and her husband had during their lives created certain charges upon the policy moneys amounting to the capital sum of 932*l.* with interest, the creation of which charges the defendant did not dispute, but claimed that, subject to the proper apportionment of such charges, the whole, or alternatively one half share, of the said policy moneys was in the circumstances payable to him as such trustee.

It appeared that one moiety of the balance of the policy moneys left after payment of the charges on the entirety would not amount to the aggregate sum paid by the plaintiff at her husband's request in respect of his share of the premiums paid by her on his behalf.

C. G. Church, for the plaintiff. This policy would have been forfeited if the plaintiff had not paid these premiums to preserve the property. *Todd* v. *Moorhouse* (1) applies. She paid the premiums for her husband at his request, and she has a lien on the policy money for the premiums so paid. The principle is stated in *In re Leslie* (2), and *Falcke* v. *Scottish Imperial Insurance Co.* (3), and in *In re Leslie* (2) Fry L.J. said that a joint ownership made no difference.

[JOYCE J. referred to the judgment of Lindley L.J. in *Strutt* v. *Tippett.* (4)]

(1) (1874) L. R. 19 Eq. 69.
(2) (1883) 23 Ch. D. 552.
(3) (1886) 34 Ch. D. 234.
(4) (1890) 62 L. T. 475, 477.

There was no notice to the insurance company of this assignment, and it does not come under the Judicature Act, 1873. Previous to that Act there could be no assignment of a chose in action of this nature. There cannot now be a valid assignment of part of a debt or chose in action: *Skipper & Tucker* v. *Holloway and Howard* (1); *Forster* v. *Baker*. (2) This assignment passed nothing at law. There cannot be a tenancy in common of a legal chose in action: Williams on Personal Property, 16th ed. p. 416.

If the trust deed did effect any assignment in equity, then the defendant must do equity and the plaintiff's equity is better than his. The defendant cannot as assignee be in a better position than his assignor, who was indebted to the plaintiff in respect of these premiums before he assigned.

The real question is whether the plaintiff has a charge for these premiums or not, because if she is entitled to a charge in respect of them there will be little or nothing left for the defendant to receive out of the policy moneys.

G. R. Northcote, for the defendant. Quite apart from the Judicature Act, there was a severance in equity of the joint tenancy by the assignment. In *In re Butler's Trusts* (3) the Court of Appeal seemed to think that a joint tenancy in a chose in action could be severed. There may be a severance of the beneficial interest, and, although the survivor could alone sue as having the legal estate, the proceeds would be divisible equally—*In re Wilks* (4)—and that would be so whether the severance was by assignment by one or by agreement between the two. This was a joint ownership of a chose in action and the husband assigned his share, and whatever he had in this policy or in covenant was assigned—*In re Hewett* (5)—and there was a severance in equity. He may have to admit that, as to payments made by her after execution of the deed of assignment, there can be no set-off for payments made before severance. The earlier payments were made by one of two co-owners and create no lien or charge: *In re Leslie* (6); *Falcke* v. *Scottish Imperial Insurance Co.* (7)

(1) [1910] 2 K. B. 630, 635, n.
(2) [1910] 2 K. B. 636.
(3) (1888) 38 Ch. D. 286.
(4) [1891] 3 Ch. 59, 61.
(5) [1894] 1 Ch. 362.
(6) 23 Ch. D. 552.
(7) 34 Ch. D. 234.

JOYCE J. 1912 McKERRELL, *In re.* McKERRELL *v.* GOWANS.

JOYCE J. I may be wrong, but I do not feel any doubt about this case. The policy of assurance was taken out by a husband and wife, and the result of the discussion before me has been, and it was practically admitted, for it could not be denied by Mr. Northcote, that the right to sue upon the covenant in the policy upon the death of the husband, who died first, survived to the wife. Hers, therefore, was the legal hand to receive the policy moneys, because whatever else the assignment by the husband may have effected it did not affect the right of the wife as survivor to sue at law upon the policy.

Therefore we have it that the wife is entitled to the policy and the policy money at law. But it is said that the husband or his assign may have an equitable right to a share in the money payable under the policy. The arrangement between the husband and wife was—as I understand, and I must accept her account, for she has not been cross-examined—that each should pay one half of the premiums on the policy. And this they mostly did, but the husband, being now and then unable to pay his half, requested the wife to pay it for him, which she says she did—I think she goes on to say, selling her jewellery for the purpose—so that, they being co-owners of the policy, the one at the request of the other pays the whole premium.

Now, as I understand the opinions of Cotton L.J., Bowen L.J., and Fry L.J., I infer from what they say in the cases which have been referred to that where one co-owner, or where anybody, pays the premium at the request of the other co-owner or of the owner of the policy, the person so paying probably has a lien. And in no case is there a suggestion that where a part owner—one of two joint owners—at the request of the other pays the premium on the policy, the person so paying is not entitled to be reimbursed out of the policy moneys by the person to whom the policy moneys come.

The wife in this case became the legal owner of the policy moneys, and the claim of the trustee under the assignment is in equity only. If the assignee of the husband comes as he does and asks for a share of the proceeds of the policy, in the first place he must do equity. That I think is quite clear. In the next place I do not see any reason why the wife is not entitled to set

off this claim she has against her husband for the portion of the premiums paid on the policy by her at his request. I go further than that, for in my opinion there is enough here to give her a lien on the husband's portion (if any) of the policy moneys. I am of opinion and decide that in the circumstances of this case she has a lien on the policy moneys, or rather on the share (if any) of the husband's trustee to whom he is said to have assigned his interest in this policy. She has a lien upon that for the overpayment she has made at her husband's request in respect of the premiums paid by her, and she is entitled to set this off before the husband's assignee gets one penny out of the policy moneys.

Further, I am not at all satisfied that the assignment made by the husband transfers or conveys any interest whatever, legal or equitable, in this policy or the moneys secured thereby. Certainly it conveys nothing at law. That is quite clear. There is no assignment under the Judicature Act, and before the Act it is clear that there could not have been a tenancy in common of a legal chose in action, although I need not decide upon that ground. As at present advised I do not think the assignment passed anything at all in the circumstances, although, I agree, it might have passed the right to all the policy moneys if the husband had survived the wife, but I am disposed to say that in the result it passed nothing at all to the trustee. Whether it passed anything or not, however, it certainly did not pass more than a moiety, and this lady is entitled to a lien or set-off—it does not matter what you call it. She is entitled to deduct the overpayments she made at the request of the husband from the share, if any, coming to the person claiming as his assignee. I understand that the costs have been agreed.

Solicitors: *Bird & Bird.*

R. M.

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An Italian subject trading in England became bankrupt in 1897, and obtained his discharge in 1901. At the date of his bankruptcy he was indebted to a creditor, also an Italian subject, but this debt was not disclosed in the bankruptcy proceedings, of which the creditor was unaware. In 1906 the debtor signed a document (privata scrittura) in Italian form, whereby he acknowledged to the creditor the amount of the debt and undertook to pay it off within five years with interest. In March, 1908, the debtor died, and in an action to administer his estate in this country the creditor claimed to prove for the amount of the debt. According to Italian law no consideration was necessary to support a promise to pay the old debt, there being a moral obligation to pay which, by the execution of the privata scrittura, was converted into a valid legal obligation. It was held by Eve J. ([1912] 2 Ch. 68) that, assuming judgment could be recovered upon the document in Italy, the claim could not be enforced in England, since it was "a proceeding in respect of a debt" within s. 30, sub-s. 3, of the Bankruptcy Act, 1883, from which the debtor had obtained a statutory release by his discharge :—

Held by the Court of Appeal, that the document of 1906 constituted a new and enforceable contract entered into after the discharge, and that the claim was not therefore barred by the provisions of s. 30, sub-s. 3.

Decision of Eve J. [1912] 2 Ch. 68, reversed.

Jakeman v. *Cook* (1878) 4 Ex. D. 26, and *In re Aylmer* (1893) 1 Manson, 391; 70 L. T. 244, followed.

Kidson v. *Turner* (1858) 3 H. & N. 581, and *Heather & Son* v. *Webb* (1876) 2 C. P. D. 1, distinguished. *In re* BONACINA. LE BRASSEUR *v.* BONACINA – – – – – **C. A. 394**

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Where a creditor has obtained in an administration action an order against the executor for personal payment of his certified debt, and he is the only creditor of the testator's estate, the fiduciary relation which originally existed between the executor and the creditor is at an end; and the creditor is not entitled to put in force against the executor the punitive jurisdiction reserved to the Court under the Debtors Act, 1869, by issuing a writ of attachment, or to obtain an order for payment into Court of money in the executor's hands, for the purpose of founding that jurisdiction.

Decision of Joyce J. reversed. *In re* THOMAS. SUTTON, CARDEN & CO., LIMITED *v.* THOMAS **C. A. 348**

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In 1851 a building society was formed under the Building Societies Act, 1836, and was never registered under the Building Societies Act, 1874. Its shares were divided into two classes, A and B shares. Rule 35 empowered its directors to borrow to an unlimited extent; and rule 97 provided for the formation of a management and contingent fund, and that the expenses of management, interest, and bonus on A shares and any losses that might be incurred by the society should be defrayed out of that fund and the deficiency (if any) should be borne by the holders of B shares only in certain proportions. From its inception the society, in addition to the ordinary business of a building society, received money on deposit from its shareholders and the public generally, and this branch of its business grew into a large concern, known as the Birkbeck Bank, which carried on the business of banking in all its branches.

In 1911 the society was ordered to be wound up, and, the assets being deficient, questions arose between the outside creditors of the society, the A and B shareholders, and the depositors as to their respective priorities :—

Held by Neville J., that rule 35 was not ultra vires, for that the power to borrow must be construed as limited to borrowing for the proper objects of the society : *Murray* v. *Scott* (1884) 9 App. Cas. 519; but that the banking business was ultra vires, and that the depositors had no legal right to recover their money.

And *held*, following *In re Guardian Permanent Benefit Building Society* (1882) 23 Ch. D. 440, that the assets ought to be applied, first, in payment of the costs of liquidation, next in payment of the debts of the outside creditors properly incurred, then in payment of the A and B shareholders of what was due to them, and then the balance rateably between the depositors.

The depositors appealed from this decision, but eventually an order was made by Neville J. and affirmed by the Court of Appeal sanctioning a scheme of arrangement between the depositors and A shareholders under s. 120 of the Companies

BUILDING SOCIETY—*continued.*

(Consolidation) Act, 1908, to which the B shareholders were not parties.

On the appeal as between the B shareholders and the depositors ;—

Held (affirming the decision of Neville J.), that the carrying on of the banking business by the society was ultra vires, and that the ultra vires transactions created no debt either legal or equitable in favour of the depositors, and therefore (Fletcher Moulton L.J. dissenting) that the depositors were not entitled to be paid in priority to the A or B shareholders.

Per Buckley L.J.: Where an association having no borrowing power receives money by way of loan or advance, the following propositions have been established :—

(1.) If the result of the transaction is that the indebtedness of the association is not increased because the new loan is applied in discharging an old debt, then it is not to be regarded as a borrowing transaction, for the invalid lender can be treated as standing in the place of those whose debt has been paid off : *In re Cork and Youghal Ry. Co.* (1869) L. R. 4 Ch. 748, 761 ; *In re Wrexham, Mold and Connah's Quay Ry. Co.* [1899] 1 Ch. 440.

(2.) The same doctrine is applicable even when the loan is applied in discharging not an old debt but a future debt : *Baroness Wenlock* v. *River Dee Co.* (1887) 19 Q. B. D. 155.

(3.) If the lender can identify his money or the investment of his money in the hands of the borrower, he can call for its return. In such case he is entitled to what is commonly called a tracing judgment ; but

(4.) If the lender cannot bring himself within any of the above propositions, then he is a person who is unable as against the borrower to affirm that he holds a debt, either legal or equitable. Neither in a Court of law nor in a Court of Equity can he affirm that he is a creditor—*In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440, 451—or entitled to such a right or claim as would support a winding-up petition : *In re National Permanent Benefit Building Society* (1869) L. R. 5 Ch. 309. Nevertheless,

(5.) When all the members of the borrowing association have received 20*s.* in the pound upon their shares, the surplus, if any, is, according to the decision in *In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440, divisible among the ultra vires creditors rateably.

Decision of Neville J. declaring priorities affirmed. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY – **C. A. 183**

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—— *Babcock & Wilcox, Ld.* v. *Water Tube Boiler and Engineering Co.* (1910) 27 Rep. Pat. Cas. 626.
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—— *Barnett* v. *Wheeler* (1841) 7 M. & W. 364
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—— *Bellerby* v. *Rowland & Marwood's Steamship Co.* [1902] 2 Ch. 14.
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Distinguished. *In re* LAING. LAING *v.* MORRISON – **[1912] 2 Ch. 387**

—— *Buckley* v. *Buckley* (1887) 19 L. R. Ir. 544.
Followed and applied. *In re* FRY. FRY *v.* FRY – **[1912] 2 Ch. 86**

CASES—*continued.*

—— *Cork and Youghal Ry. Co., In re* (1869) L. R. 4 Ch. 748.
Referred to. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY [1912] 2 Ch. 183

—— *Craig* v. *Wheeler* (1860) 29 L. J. (Ch.) 374
Approved. *In re* WAREHAM. WAREHAM *v.* BREWIN – [1912] 2 Ch. 312

—— *Cripps* v. *Wolcott* – (1819) 4 Madd. 11
Applied. *In re* POULTNEY. POULTNEY *v.* POULTNEY – [1912] 2 Ch. 541

—— *Crowe* v. *Crisford* – (1853) 17 Beav. 507
Overruled. *In re* WAREHAM. WAREHAM *v.* BREWIN – [1912] 2 Ch. 312

—— *Dashwood* v. *Magniac* – [1891] 3 Ch. 306
Followed. *In re* TREVOR-BATYE'S SETTLEMENT. BULL *v.* TREVOR-BATYE – – [1912] 2 Ch. 339

—— *Davies* v. *Davies* – (1882) 30 W. R. 918
Distinguished. *In re* LAING. LAING *v.* MORRISON – [1912] 2 Ch. 387

—— *Dodson, In re* – – [1908] 2 Ch. 638
Discussed and applied. HERBERT *v.* HERBERT – – [1912] 2 Ch. 268

—— *Eichbaum* v. *City of Chicago Grain Elevators* [1891] 3 Ch. 459.
Followed. ROWELL *v.* JOHN ROWELL & SONS, LIMITED – [1912] 2 Ch. 609

—— *Elmore's Will, In re* – (1860) 9 W. R. 66
Overruled. *In re* WAREHAM. WAREHAM *v.* BREWIN – [1912] 2 Ch. 312

—— *Fauntleroy* v. *Beebe* – [1911] 2 Ch. 257
Discussed and applied. HERBERT *v.* HERBERT – – [1912] 2 Ch. 268

—— *Flood* v. *Irish Provident Assurance Co.* [1912] 2 Ch. 597.
Followed. JOSEPH *v.* LAW INTEGRITY INSURANCE COMPANY [1912] 2 Ch. 581

—— *Frank James & Sons, In re* [1903] W. N. 99.
Distinguished. *In re* PORTER, AMPHLETT & JONES – [1912] 2 Ch. 98

—— *Game, In re* – – [1897] 1 Ch. 881
Followed and approved. *In re* WAREHAM. WAREHAM *v.* BREWIN [1912] 2 Ch. 312

—— *Games* v. *Bonnor* (1884) 54 L. J. (Ch.) 517.
Followed. *In re* ATKINSON AND HORSELL'S CONTRACT – [1912] 2 Ch. 1

—— *Gorely, Ex parte* – (1864) 4 D. J. & S. 477
Followed. SINNOTT *v.* BOWDEN [1912] 2 Ch. 414

—— *Grey* v. *Friar* – (1854) 4 H. L. C. 565
Followed. STAIT *v.* FENNER [1912] 2 Ch. 504

—— *Griffith* v. *Richard Clay & Sons, Ld.* [1912] 1 Ch. 291.
Affirmed – – [1912] 2 Ch. 291

CASES—*continued.*

—— *Guardian Permanent Benefit Building Society, In re* (1882) 23 Ch. D. 440.
Followed. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY [1912] 2 Ch. 183

—— *Harris* v. *Poyner* – (1852) 1 Drew. 174
Approved. *In re* WAREHAM. WAREHAM *v.* BREWIN – [1912] 2 Ch. 312

—— *Heather & Son* v. *Webb* (1876) 2 C. P. D. 1
Distinguished. *In re* BONACINA. LE BRASSEUR *v.* BONACINA [1912] 2 Ch. 394

—— *Highett and Bird's Contract, In re* [1903] 1 Ch. 287.
Distinguished. *In re* TAUNTON AND WEST OF ENGLAND PERPETUAL BENEFIT BUILDING SOCIETY AND ROBERTS' CONTRACT – [1912] 2 Ch. 381

—— *Hoare, In re* – – [1892] 3 Ch. 94, 100
Applied. *In re* METROPOLITAN AMALGAMATED ESTATES, LIMITED. FAIRWEATHER *v.* THE COMPANY [1912] 2 Ch. 497

—— *Howarth, In re* – – [1909] 2 Ch. 19
Must be taken to have overruled *Taylor* v. *Taylor* (1874) L. R. 17 Eq. 324.
In re YOUNG. BROWN *v.* HODGSON [1912] 2 Ch. 479

—— *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137a.
The rule in, applied. *In re* WAREHAM. WAREHAM *v.* BREWIN [1912] 2 Ch. 312

—— *Hulm & Lewis, In re* – [1892] 2 Q. B. 261
Distinguished. *In re* HURST & MIDDLETON, LIMITED. MIDDLETON *v.* THE COMPANY – [1912] 2 Ch. 520

—— *Jakeman* v. *Cook* – (1878) 4 Ex. D. 26
Followed. *In re* BONACINA. LE BRASSEUR *v.* BONACINA [1912] 2 Ch. 394

—— *Joens* v. *Phipps* – (1868) L. R. 3 Q. B. 567
Explained. STAIT *v.* FENNER [1912] 2 Ch. 504

—— *Joseph Stocks & Co., In re, Willey* v. *Joseph Stocks & Co.* Reported as a note [1912] 2 Ch. 134, n.
Discussed. NORTHERN ASSURANCE COMPANY, LIMITED *v.* FARNHAM UNITED BREWERIES, LIMITED [1912] 2 Ch. 125

—— *Kidson* v. *Turner* – (1858) 3 H. & N. 581
Distinguished. *In re* BONACINA. LE BRASSEUR *v.* BONACINA [1912] 2 Ch. 394

—— *May* v. *Yuill & Co.* (1910) 27 Rep. Pat. Cas. 525.
Not followed. BRITISH, FOREIGN AND COLONIAL AUTOMATIC LIGHT CONTROLLING COMPANY, LIMITED *v.* METROPOLITAN GAS METERS, LIMITED [1912] 2 Ch. 82

CASES—*continued.*

—— *Metropolitan Water Board* v. *Phillips* [1912] 1 Ch. 296.
Reversed – – **[1912] 2 Ch. 546**

—— *Mordaunt* v. *Benwell* (1881) 19 Ch. D. 302
Discussed and applied. HERBERT *v.* HERBERT – – **[1912] 2 Ch. 268**

—— *Murray* v. *Scott* – (1884) 9 App. Cas. 519
Referred to. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY **[1912] 2 Ch. 183**

—— *National Permanent Benefit Building Society, In re* (1869) L. R. 5 Ch. 309.
Referred to. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY **[1912] 2 Ch. 183**

—— *Perry* v. *Meddowcroft* – (1841) 4 Beav. 197
Doubted. *In re* DE SOMMERY. COELENBIER *v.* DE SOMMERY **[1912] 2 Ch. 622**

—— *Pickard, In re* [1885] W. N. 137; 53 L. T. 293.
Discussed and applied. HERBERT *v.* HERBERT – – **[1912] 2 Ch. 268**

—— *Pink, In re. Pink* v. *Pink* [1912] 1 Ch. 498.
Order of Eve J. varied **[1912] 2 Ch. 528**

—— *Poultney, In re. Poultney* v. *Poultney* [1912] 1 Ch. 245.
Reversed – – **[1912] 2 Ch. 541**

—— *Preston* v. *Tunbridge Wells Opera House, Ld.* [1903] 2 Ch. 323, 325.
Applied. *In re* METROPOLITAN AMALGAMATED ESTATES, LIMITED. FAIRWEATHER *v.* THE COMPANY **[1912] 2 Ch. 497**

—— *Prudential Insurance Co.* v. *Inland Revenue Commissioners* [1904] 2 K. B. 658.
Followed. JOSEPH *v.* LAW INTEGRITY INSURANCE COMPANY **[1912] 2 Ch. 581**

—— *Pycroft* v. *Gregory* – (1829) 4 Russ. 526
Distinguished. *In re* SOPER. NAYLOR *v.* KETTLE – – **[1912] 2 Ch. 467**

—— *Scott* v. *Nixon* (1843) 3 D. & War. 388, 407
Observations of Lord St. Leonards in, commented on. *In re* ATKINSON AND HORSELL'S CONTRACT **[1912] 2 Ch. 1**

—— *Seaward* v. *Drew* (1898) 67 L.J. (Q.B.) 322, 324.
Dictum of Channell J. in, dissented from. STAIT *v.* FENNER **[1912] 2 Ch. 504**

—— *Smith, In re* – – (1904) 1 Ch. 139
Referred to. *In re* DE SOMMERY. COELENBIER *v.* DE SOMMERY **[1912] 2 Ch. 622**

—— *Southampton Guardians* v. *Bell* (1888) 21 Q. B. D. 297, 300.
Applied. *In re* PORTER, AMPHLETT & JONES – – **[1912] 2 Ch. 98**

—— *Strong* v. *Bird* – (1874) L. R. 18 Eq. 315
Referred to. *In re* PINK. PINK *v.* PINK – – **[1912] 2 Ch. 528**

CASES—*continued.*

—— *Taylor* v. *Taylor* – (1874) L. R. 17 Eq. 324
Must be taken to have been overruled by *In re Howarth* [1909] 2 Ch. 19.
In re YOUNG. BROWN *v.* HODGSON **[1912] 2 Ch. 479**

—— *Teasdale's Case* – (1873) L. R. 9 Ch. 54
Followed. ROWELL *v.* JOHN ROWELL AND SONS, LIMITED **[1912] 2 Ch. 609**

—— *Thomas* v. *Brigstocke* (1827) 4 Russ. 64, 65
Applied. *In re* METROPOLITAN AMALGAMATED ESTATES, LIMITED. FAIRWEATHER *v.* THE COMPANY **[1912] 2 Ch. 497**

—— *Thwaites* v. *Foreman* – (1844) 1 Coll. 409
Followed. *In re* HARRIS. HARRIS *v.* HARRIS – – **[1912] 2 Ch. 241**

—— *Vachell* v. *Roberts* – (1863) 32 Beav. 140
Overruled. *In re* WAREHAM. WAREHAM *v.* BREWIN – **[1912] 2 Ch. 312**

—— *Wearing* v. *Wearing* – (1856) 23 Beav. 99
Overruled. *In re* WAREHAM. WAREHAM *v.* BREWIN – **[1912] 2 Ch. 312**

—— *Wenlock (Baroness)* v. *River Dee Co.* (1887) 19 Q. B. D. 155.
Referred to. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY **[1912] 2 Ch. 183**

—— *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888) 13 App. Cas. 699, 714.
Referred to. SINNOTT *v.* BOWDEN **[1912] 2 Ch. 414**

—— *Whitmore, In re* – – [1902] 2 Ch. 66
Distinguished. *In re* LAING. LAING *v.* MORRISON – – **[1912] 2 Ch. 386**

—— *Wrexham, Mold and Connah's Quay Ry. Co., In re* [1899] 1 Ch. 440.
Referred to. *In re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY **[1912] 2 Ch. 183**

CHARGE — Annuity — Charge on income or capital—Trust to pay out of income—Gift of corpus "subject to the said annuities" – – – – **479**
See WILL. 1.

CHARITY—"*Endowment*"—*Sale of Land—Consent of Charity Commissioners—Voluntary Subscriptions—Mixed Charity—Trust Deed—Implied Authority to settle Trusts for General Purposes—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

A charity was formed in 1758 and was supported by the donations, legacies, and subscriptions of benevolent persons. In 1771 it contemplated building a new school in London and, through a committee, collected subscriptions for the purchase of land as the site of the school, and for the building of the school, which was used by the charity until 1848, when a school in another locality was built and thenceforth used in lieu of the London school. The site for the London school and the building of that school were paid for partly by the subscriptions given

CHARITY—*continued.*

for that purpose, and partly, to at least an equal extent, out of the ordinary subscriptions to the charity which could be used for the general purposes of the society. The committee had the land conveyed to trustees upon trust for and for the only use, benefit, and service of the charity, "and to be conveyed and disposed of, from time to time, in such manner as should be ordered and directed for that purpose at any general court or meeting of the subscribers to the said charity for the time being." There was no evidence as to whether the donors of the subscriptions to the school fund had or had not authorized a conveyance upon these trusts. By an Act passed in 1848 the charity was incorporated, with power to hold land and for the purposes of the institution to convey and dispose of such land. In 1905 this power of disposition was taken away by an Act which amalgamated the charity with other charities under a different name, and gave the newly incorporated body power to sell its land, but provided (s. 13) that this power should "as regards property . . . . forming an endowment for charitable purposes (other than educational), and not exempted from the jurisdiction or control of the Charity Commissioners . . . . or the powers or provisions of the Charitable Trust Acts, 1853 to 1894, by such Acts or otherwise, be exerciseable with the consent of the said Commissioners, and, as regards property forming an endowment for educational purposes, and not exempted under the Charitable Trusts Acts, 1853 to 1894, and the Endowed Schools Acts, 1869 to 1889, or otherwise, with the consent of the Board of Education."

The charity having contracted to sell land forming the site of the London school, the purchasers raised the question whether the consent, either of the Charity Commissioners or of the Board of Education, was required:—

Held, (1.) that the meaning of s. 13 of the Act of 1905 was that where, but for that Act, the consent of the Charity Commissioners or of the Board of Education would be necessary, it was still to be necessary notwithstanding the power of sale previously given; (2.) that the charity was not within the exemptions from the control of the Charity Commissioners or the Board of Education given by s. 66 of the Charitable Trusts Act, 1853, as a society "wholly maintained by voluntary contribution"; (3.) that the charity was within the exemptions of s. 66 of the Act of 1853 so far as it was maintained by voluntary subscriptions; (4.) that, applying the principle of *Attorney-General v. Mathieson* [1907] 2 Ch. 383, the committee must, in the absence of evidence, be assumed to have had the authority of the subscribers to the building fund to declare trusts for the general purposes of the charity; and (5.) that the land contracted to be sold was a donation to a mixed charity of which no special application or appropriation had been directed or declared by the donor, and which might legally be applied by the charity as income in aid of the voluntary subscriptions, and therefore was, by s. 66 of the Act of 1853, exempted from the control of the Charity Commissioners and the Board of Education.

CHARITY—*continued.*

The expressions "voluntary contributions" and "endowment" defined. *In re* ORPHAN WORKING SCHOOL AND ALEXANDRA ORPHANAGE'S CONTRACT - - - **Parker J. 167**

2. —— *Will—Charitable Legacy—Lapse—Scheme—Alteration of Objects of Charity—Destruction of Endowed Charity — Parties — Attorney-General's Right to Appeal.*

Mrs. Faraker, who died in 1911, gave by her will a legacy of 200*l.* "to Mrs. Bailey's Charity, Rotherhithe." There was at Rotherhithe a charity known as Hannah Bayly's Charity, founded in 1756 by a Mrs. Bayly for the benefit of poor widows resident in and parishioners of St. Mary, Rotherhithe. In 1905 the Charity Commissioners sealed a scheme in the matter of the Charity of Hannah Bayly's Charity and thirteen other charities in Rotherhithe whereby the endowments of all these charities were consolidated, trustees were appointed, and trusts declared for the benefit of the poor of Rotherhithe. There was no mention of widows in the scheme.

Mrs. Faraker's executors took out a summons against the trustees of the consolidated charities and a residuary legatee to determine whether the legacy had lapsed. No question was raised on the spelling of the name Bayly.

Neville J. held that Hannah Bayly's Charity had ceased to exist and the legacy had lapsed.

The Attorney-General was not a party to the summons, but he now appealed by special leave granted by the Court of Appeal:—

Held, reversing the decision of Neville J., that the Attorney-General had a right to be a party to the proceedings and to appeal, although the trustees of the consolidated charities had been present and had argued the question in the Court below; that Hannah Bayly's Charity was an endowed charity and could not be destroyed and was not extinct, although its objects had been changed in accordance with law; and that the consolidated charities were entitled to the legacy. The Court also expressed the opinion that a specific provision for widows ought not to have been omitted from the scheme, and suggested that an application should be made to amend the scheme by inserting such a provision. *In re* FARAKER. FARAKER *v.* DURELL **C. A. 488**

—— Will—Charitable legacies—Will made after Mortmain and Charitable Uses Act, 1891—Priority of payment - - **241**
See WILL. 2.

CHOSE IN ACTION—Policy of assurance—Premium paid by one joint tenant at request of the other—Set-off—Lien—Assignment by one joint tenant—Effect
See JOINT TENANCY. **648**

CHURCH OF ENGLAND.
See ECCLESIASTICAL LAW.

CHURCHWARDENS—Qualification—Residence—Validity of appointment - - **256**
See SCHOOLS.

CLASS—Class gift after life estate—Class to be ascertained at testator's death—Gift over to "survivors" — Survivorship referring to period of distribution **541**
See WILL. 3.

—— Legacy duty—Contingent class—Successive interests – – – – – **445**
See REVENUE. 2.

COMMON—Inclosure Act—Commons and wastes —Compensation for rights "in and to the soil"—Whether minerals reserved
See INCLOSURE ACT. **280**

COMPANY—*Debenture-holders — Trust Deed — Resolution of Majority binding Minority—Scheme making Special Provisions for Special Interests —Bribe.*

The power conferred by a trust deed on a majority of debenture-holders to bind a minority must be exercised bona fide, and the Court will interfere to prevent unfairness or oppression; but, subject to this, each debenture-holder may vote with regard to his individual interests, though those interests may be peculiar to himself and not shared by other debenture-holders.

A secret bargain by one debenture-holder for special treatment might be considered as corrupt and in the nature of bribery, but there can be no question of bribery where a scheme openly provides for the separate treatment of persons with special interests and such persons are not incapacitated from voting on the scheme. Where, however, there are diverse interests, and none the less where those diverse interests are specially provided for, the Court ought to consider carefully the fairness of any scheme by which a majority seeks to bind a minority.

The company had issued debentures to the amount of 200,000*l.* bearing interest at 4½ per cent., and guaranteed, as to 150,000*l.* part thereof, by the Law Guarantee Society (now in voluntary liquidation), and as to the remaining 50,000*l.*, by the B. S. Investment Trust, 47,000*l.* of these debentures being taken up by the Trust itself. The Society and Trust were joint trustees of a trust deed securing the debentures and providing for remuneration and certain payments to the Society and Trust in consideration of their respective guarantees, and giving to a majority of the debenture-holders usual powers to bind a minority. The Society through its liquidators recently offered to retire from the trusteeship and to forgo any further payments under the trust deed in consideration of being released from its guarantee. The company desired to accept this offer and submitted a scheme to the debenture-holders providing that they should accept non-guaranteed debentures bearing interest at 5 per cent. in lieu of the guaranteed debentures bearing interest at 4½per cent., and also providing in effect that all payments falling to be made by the company to the Trust under the trust deed should remain unaffected except that the Trust should give credit for the additional 10*s.* interest on the debentures formerly guaranteed by them. Without this provision the Trust would not have supported the scheme. A resolution in favour of the scheme was passed by the requisite majority of debenture-holders, the Trust (without

COMPANY—*continued.*

whose vote it would not have been carried) voting in favour of the resolution. The plaintiff, the holder of a debenture guaranteed by the Society, impeached the resolution on the ground that the payments to be made to the Trust were in the nature of a bribe to induce the Trust to vote in favour of the scheme:—

Held, that the separate treatment of the Trust openly provided for by the scheme was not in the nature of a bribe; that the trust was not thereby incapacitated from voting on the scheme; and that the resolution being carried by the requisite majority was valid and binding on the plaintiff. GOODFELLOW *v.* NELSON LINE (LIVERPOOL), LIMITED – **Parker J. 324**

2. —— *Debentures — Floating Charge on Present and Future Property — No Power to create Charges in Priority—Purchase of Property by Company—Advance of Purchase-money —Equitable Charge on Property so purchased— Deposit of Title Deeds—Priority.*

A company issued debentures creating a floating charge upon their undertaking and all their property present and future, one of the conditions of the debentures being that the company should not be at liberty to create any other mortgage or charge in priority to the debentures. All the debentures were duly registered under the Companies Act, 1800. The company, desiring to purchase certain property, which they had not the money to pay for, borrowed 1000*l.* from O. upon terms that she should have a charge upon the property so purchased. The company then bought the property for 1100*l.* and paid a deposit of 150*l.* Upon completion of the purchase O. was present, and gave her cheque for 1000*l.*, which was paid into the company's banking account, the company paying the balance of the purchase-money to the vendor in cash. The same solicitor acted for all parties, and he took and retained the title deeds of the property on behalf of O. A week later the company executed in favour of O. a memorandum of equitable charge upon the property. The solicitor did not investigate the title nor search the register of debentures on O.'s behalf. In an action to realize the debentures:—

Held, that what the company acquired upon the purchase was only the equity of redemption in the property subject to the equitable charge of O., who was accordingly entitled to priority over the debentures.

Decision of Warrington J. affirmed. *In re* CONNOLLY BROTHERS, LIMITED (NO. 2). WOOD *v.* THE COMPANY – – – – **C. A. 25**

3. —— *Debentures — Trust Deed — General Meeting — "Extraordinary Resolution"—Power of Majority to bind Minority—Power to sanction Modification of Rights—Redeemable Debentures —Conversion into Irredeemable—Special Circumstances — Condition Precedent — Additional Powers — "Modification" — "Redeemable" — "Irredeemable"—Meaning of.*

A debenture trust deed conferred upon a general meeting of the debenture-holders a power, exercisable by extraordinary resolution passed by a majority of not less than three-fourths of the number of persons voting thereat,

to sanction any modification or compromise of the rights of the debenture-holders against the company or against its property, whether arising under the debentures, or the trust deed or otherwise, and provided that an extraordinary resolution duly passed should be binding upon all the debenture-holders :—

Held, that the conversion of redeemable debentures into irredeemable or perpetual debentures was a modification of the rights of the debenture-holders within the meaning of the power, and that the existence of some serious or special circumstances was not a condition precedent to the exercise of the power.

The meaning of "redeemable" and "irredeemable" as applied to debenture stock, and the modification of the rights of stock holders effected by the conversion of redeemable stock into irredeemable stock, discussed by Eve J. in *In re Joseph Stocks & Co.* [1912] 2 Ch. 134, note.

See also a report of *In re Joseph Stocks & Co., Willey* v. *Joseph Stocks & Co.*, as a note at pp. 134—141 of the above case. NORTHERN ASSURANCE COMPANY, LIMITED *v.* FARNHAM UNITED BREWERIES, LIMITED - **Joyce J. 125**

4. —— *Meeting — Persons entitled to make Requisition—Requisition in several Documents—"Like Form"—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 66, *sub-ss.* 1, 2.

By s. 66, sub-s. 1, of the Companies (Consolidation) Act, 1908, "Notwithstanding anything in the articles of a company, the directors of a company shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company," and by sub-s. 2 "The requisition . . . . may consist of several documents in like form, each signed by one or more requisitionists."

A company had a nominal capital of 60,000 shares, of which 48,000 shares had been offered for subscription. The issued share capital was 22,357 shares, on 5094 of which all calls and sums due had been paid. A requisition under sub-s. 1 of s. 66 calling upon the directors to convene an extraordinary general meeting was signed by the holders of 690 out of the 5094 shares. The requisition consisted of a number of documents which were in two forms. By the first form the directors were requested to call an extraordinary general meeting of the company for the purpose of considering the reconstitution of the board and resolutions concerning the directorate and officers of the company. The second was in identical terms except that there were added at the end of it the words "in addition to the affairs of the company in general" :—

Held, that the "one-tenth" referred to in sub-s. 1 was one-tenth of that part of the issued share capital of the company upon which all calls or other sums then due had been paid, and not one-tenth of the issued share capital of the company the holders of which one-tenth had paid all calls, &c., upon their shares, and, therefore, that the requisition was signed by a sufficient number of duly qualified shareholders.

Held, also, that the documents constituting the requisition were "in like form" within the meaning of sub-s. 2. FRUIT AND VEGETABLE GROWERS' ASSOCIATION, LIMITED *v.* KEKEWICH **Warrington J. 52**

5. —— *Memorandum of Association—"Business of life insurance" prohibited—Bond Investment Policy—Provision for Return of Premiums in Event of Death before Expiration of Fixed Period—Ultra vires—Policy on Human Life—Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 2, 30 ; *Sched. V., Form* (*E.*), *clause* 7.

A company was incorporated under the Companies Acts, 1862 to 1900. Its objects as stated in its memorandum of association were (inter alia) "to carry on and transact every kind of insurance and guarantee business in all branches (except the business of life insurance)," and it was thereby expressly provided that "Nothing herein contained shall empower the company to carry on the business of life assurance, or the granting of annuities within the meaning of the Life Assurance Companies Act, 1870."

The company had issued a number of investment policies which were all in one or other of two forms. The first form, called Policy Form A, was therein described as an investment policy, at a weekly premium of 6*d.* to secure 22*l.* 10*s.*, namely 6*l.* at the end of five years, 7*l.* 10*s.* at the end of ten years, and 9*l.* at the end of fifteen years. The policy charged the assets of the company with the payment to the assured or his representatives or assigns of the sums aforesaid and provided that in the event of the death of the assured before the fifth year all premiums paid would be returned in full, and after the fifth and tenth years all premiums paid since the last payment made by the company would be returned. The second form, called Policy Form B, differed slightly from Policy Form A. The policy purported to secure the payment of a certain sum at the end of a fixed term in consideration of a weekly premium and charged the funds of the company with its payment, and provided that if the assured should die before the date on which the sum became payable a percentage of the premiums received on account should be payable to the representatives or assigns of the assured. The company had not deposited 20,000*l.* as required by s. 2 of the Assurance Companies Act, 1909 :—

Held, that both forms of policies were policies of insurance on human life and that the company was therefore carrying on the business of life assurance contrary to the provisions of the memorandum of association, and that the issue of the policies was accordingly ultra vires the company.

Held, also, that the company was carrying on "life assurance business" within the meaning of s. 1 of the Act of 1909, and that, inasmuch as it had not made the deposit of 20,000*l.* required by s. 2 of the Act, the policies were illegal.

Prudential Insurance Co. v. *Inland Revenue Commissioners* [1904] 2 K. B. 658, and *Flood* v. *Irish Provident Assurance Co.* [1912] 2 Ch.

COMPANY—*continued.*

597, n., followed. JOSEPH *v.* LAW INTEGRITY INSURANCE COMPANY, LIMITED – **C. A. 581**

NOTE.—See also a report of *Flood* v. *Irish Provident Assurance Company* as a note at p. 597 of the above case.

6. —— *Receiver—Debenture-holder's Action—Proceedings to be carried on by Receiver—Costs out of Assets—Proceedings against a Mortgagee who has a Charge upon the whole of the Assets—Discretion of Court—Practice.*

The question of what proceedings a receiver appointed in a debenture-holder's action is to be allowed to take or continue at the cost of the company's assets is one wholly for the discretion of the Court. The fact that a debenture-holder has a charge upon all the assets of the company does not give him a right to prevent the receiver being allowed to carry on proceedings commenced by the company against him in another capacity at the cost of the assets over which he has a charge. VIOLA *v.* ANGLO-AMERICAN COLD STORAGE COMPANY – **Swinfen Eady J. 305**

7. —— *Scheme of Arrangement—Reduction of Capital — Reorganization of Share Capital — Alteration of Preferential Rights defined by Memorandum—Companies (Consolidation) Act,* 1908 (*8 Edw. 7, c. 69*), *ss.* 45, 46, 120.

Sect. 45 of the Companies (Consolidation) Act, 1908, is confined to two modes of reorganizing share capital, namely, (*a*) by the consolidation of shares of different classes and (*b*) by the division of shares into shares of different classes.

Whether compliance with s. 120 alone would be sufficient in the case of a scheme of arrangement involving a reorganization within s. 45, quære. *In re* PALACE HOTEL, LIMITED **Swinfen Eady J. 438**

8. —— *Shares — Limited Company — Surrender of Shares—Exchange for New Shares—No Reduction of Capital involved—Validity.*

A surrender of shares to a limited company, not involving any reduction of capital and not amounting to a purchase of its own shares by the company, is not necessarily ultra vires.

In 1896, pursuant to articles of association and special resolution, the holders of 6 per cent. fully-paid preference shares surrendered the same to the company in exchange for fully-paid 5 per cent. preference shares, and a contract in writing was duly filed with the Registrar of Joint Stock Companies, pursuant to s. 25 of the Companies Act, 1867. The surrendered shares were not cancelled, but were subject to be reissued by the company :—

Held, that the surrender not involving any reduction of capital was valid; that the transaction did not amount to a purchase by the company of its own shares; and that the new shares issued in exchange were fully paid up.

Teasdale's Case (1873) L. R. 9 Ch. 54, and *Eichbaum* v. *City of Chicago Grain Elevators* [1891] 3 Ch. 459, followed.

Dicta of Stirling L.J. and Cozens-Hardy L.J. in *Bellerby* v. *Rowland & Marwood's Steamship Co.* [1902] 2 Ch. 14, discussed and distinguished. ROWELL *v.* JOHN ROWELL & SONS, LIMITED **Warrington J. 609**

COMPANY—*continued.*

9. —— *Shares—Preference Shares—Distribution of Profits—Priority—Ordinary Shares—Rights of Shareholders inter se.*

Where preference shares are given a fixed preferential dividend at a specified rate the right of the holders of such shares to take any further dividend is impliedly negatived.

A company which has power under its articles to issue new shares upon such terms including preference as the company might direct passed a resolution that the capital of the company be increased by the issue of certain new shares to be called preference shares, and the holders thereof to be entitled to cumulative preferential dividends at the rate of 10 per cent. per annum on the amount for the time being paid up on such shares, and that such preference shares should rank, both as regards capital and dividend, in priority to the other shares.

Preference shares were issued in accordance with this resolution.

The articles further provided that, subject to any priorities that might be given upon the issue of any new shares, the profits of the company available for distribution should be distributed as dividend among the members in accordance with the amounts paid on the shares held by them respectively :—

Held, that in the distribution of profits holders of the preference shares were not entitled to anything more than a 10 per cent. dividend.

Decision of Joyce J. reversed. WILL *v.* UNITED LANKAT PLANTATIONS COMPANY, LIMITED – – – – – **C. A. 571**

—— Solicitor — Costs — Taxation — Bill of costs delivered to company—Voluntary winding-up — Payment — Retainer of amount—Delivery twelve months before summons for taxation – – **161**
See SOLICITOR. 3.

CONDITION—Lease—Power to determine on notice—Covenants—Outstanding legal estate—Conditions precedent—Invalid notice—Estoppel – – – **504**
See LANDLORD AND TENANT.

—— Public policy — Condition subsequent — Condition against children living with or under the control of their father
See WILL. 4. **471**

CONSENT—Charity Commissioners.
See under CHARITY.

CONTINGENT CLASS—Legacy duty—Successive interests – – – – – **445**
See REVENUE. 2.

CONTRACT — Highway authority — Urban authority—Agreement to widen highway — Contract not under seal but executed—Contract over 50*l.* in value Statute of Frauds – – – **452**
See LOCAL GOVERNMENT.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONTRACT OF SERVICE—Church of England curates—Employment—National insurance – – – – – 563
See INSURANCE (NATIONAL).

CONVERSION—Partition action—Order for sale—Married woman—No request for sale—Death of husband – – – 268
See PARTITION.

—— Will—"Rents, issues and profits"—Leaseholds—Enjoyment in specie – 312
See WILL. 11.

CONVEYANCING AND LAW OF PROPERTY — Insurance (Fire) — Mortgagee of house destroyed by fire — Right to have insurance money applied in rebuilding – – – – – 414
See INSURANCE (FIRE).

—— Lease — Power to determine on notice—Covenants—Assignments—Outstanding legal estate—Breaches of covenant—Conditions precedent—Invalid notice
See LANDLORD AND TENANT. 504

—— Leasehold property—Open contract to sell—Breaches of lessee's covenants—Receipt for rent– – – – 381
See VENDOR AND PURCHASER. 2.

—— Settled land—Land in Ireland—Order of Court in Ireland appointing trustees—Purchase of land in England—Capital moneys—Purchaser's right to inquire into source of – – – – 141
See VENDOR AND PURCHASER. 4.

COSTS — Company — Receiver — Debentureholder's action—Costs out of assets 305
See COMPANY. 6.

—— Patent—Taxation—Costs of particulars of objections to abandoned patents – 82
See PATENT.

—— Restrictive covenants—Building plans to be approved by vendor's surveyor—Costs of approval – – – 42
See VENDOR AND PURCHASER. 3.

—— Solicitors'.
See under SOLICITOR.

COVENANT—Breaches of lessee's covenants—Leasehold property—Open contract to sell—Receipt for rent – – 381
See VENDOR AND PURCHASER. 2.

—— Lease—Assignment as "beneficial owner"—Implied covenants for title – 504
See LANDLORD AND TENANT.

—— Restrictive covenants—Building plans to be approved by vendor's surveyor—Costs of approval – – – 42
See VENDOR AND PURCHASER. 3.

CURATES—Insurance (National) — Church of England curates—Employment—Contract of service – – – – 563
See INSURANCE (NATIONAL).

CUSTOM—Building plans to be approved by vendor's surveyor—Costs of approval
See VENDOR AND PURCHASER. 3. 42

DAMAGES — Lights (Ancient)—Obstruction—Measure of damages—Site value – 291
See LIGHT.

DEBENTURE-HOLDERS AND DEBENTURES —Company.
See under COMPANY.

DEBT—*Release—Cancellation—Will—Construction—Deduction of Debts from Settled Legacies—Advances by Testator—Entries in Testator's Ledger—Release of Debt—Continuing Intention—Appointment of Debtor as Executor.*

A testator during his life made advances of 9800*l.* to his son-in-law M. In the testator's ledger there was an entry with respect to M.'s debt in 1905 that 5000*l.* had been given off the debt for an object arranged with M.'s wife; and in June, 1909, there was a further entry, "This debt is absolutely cancelled from this date, viz., 4800*l.* and interest. Edward Pink." By his will, made in March, 1908, the testator appointed M. to be one of his executors and settled a sum of 20,000*l.* and one fourth of his residue upon M.'s wife and children and directed that if M.'s wife should die within seven years of his death any sum due from M. should be absolutely extinguished, and that any loss sustained in respect of any indebtedness of M. should be credited as a loss to the trust legacy of 20,000*l.* and not as a loss to his residuary estate. Upon a summons by the legal personal representatives of the testator to have it determined whether the debts were still due, Eve J. held that there was not sufficient evidence of an intention by the testator to make a gift, and even if there were such an intention or an imperfect gift it was not perfected by the appointment of M. as executor, that the case did not come within *Strong* v. *Bird* (1874) L. R. 18 Eq. 315, and that the whole debt of 9800*l.* was still due.

M. and his wife appealed:—

Held (varying the order of Eve J. [1912] 1 Ch. 498), that as to 5000*l.* the indebtedness continued, but as to 4800*l.* it had been released by the testator, and the defect in M.'s title had been cured by his appointment as executor. The only debt therefore that could be enforced against him was that of 5000*l.* *In re* PINK. PINK *v.* PINK – – – – C. A. 528

—— Bankruptcy of debtor—Discharge—Statutory release—Subsequent acknowledgment of debt – – – – 394
See ADMINISTRATION.

DEBTORS ACT—Fiduciary relation—Executor—Judgment against executor "de bonis propriis"—Determination of fiduciary relation – – – – – 348
See ATTACHMENT.

DEDICATION—Proposed road and footpath—User by public—Intention—Extent of dedication—Adjoining owner—Right of access to highway – – – 633
See HIGHWAY. 1.

DEDICATION—*continued.*

—— Railway company — Sidings — Power to dedicate—Ultra vires – – – **110**
See HIGHWAY. 2.

DESIGN — *Infringement — Pattern for Set of Type—Matrices for Casting—Sale in the United Kingdom for Shipment to India—Doing anything with a View to enable the Design to be applied—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 60.

The Patents and Designs Act, 1907, s. 60, provides: "(1.) During the existence of copyright in any design it shall not be lawful for any person (*a*) for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof, except with the licence or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied;"

The plaintiffs were proprietors of a design registered in respect of a set of type metal letters, the claim being for the pattern. The defendants were manufacturers of matrices or moulds in which types are cast, and had recently sold and delivered to the India Office in London matrices for casting type for purposes of sale in India in accordance with the plaintiffs' registered design. It was admitted that the matrices were intended for shipment to Madras, and that the design would not be applied to any type in the United Kingdom:—

Held, that, although the copyright in the design afforded the plaintiffs no protection in India, still the acts of the defendants in this country were in contravention of the concluding words of s. 60, sub-s. 1 (*a*). JOHN HADDON & CO. *v.* R. P. BANNERMAN & SON
Warrington J. 602

DETERMINATION — Lease — Conditions precedent—Invalid notice—Estoppel – **504**
See LANDLORD AND TENANT.

DISCHARGE—Debt—Bankruptcy of debtor—Statutory release – – – **394**
See ADMINISTRATION.

DISMISSAL — School — Headmaster—Managing body—Defect in appointment or qualification of any manager – – **256**
See SCHOOLS.

DUTY—Inland Revenue.
See under REVENUE.

EASEMENT—Way, Right of.
See under WAY, RIGHT OF.

ECCLESIASTICAL LAW — Bankruptcy of incumbent—Sequestration of benefice—Recovery of tithes paid by mistake of fact—Liability of bishop – – **318**
See TITHES.

—— Curates—Church of England curates—Employment — Contract of service — National Insurance Act, 1911 – **563**
See INSURANCE (NATIONAL).

EDUCATION.
See under SCHOOLS.

EQUITABLE LIMITATIONS — Fee simple determinable on bankruptcy, &c.—Executory devise—"Male heir of the body"—Failure of issue – – **422**
See WILL. 6.

ESTOPPEL—Acceptance of lease omitting part of land in agreement – – – **60**
See WAY, RIGHT OF.

—— Highway, Agreement to widen—Contract not under seal but executed—Contract over 50*l.* in value—Statute of Frauds
See LOCAL GOVERNMENT. **452**

—— Lease—Determination — Conditions precedent—Invalid notice – – – **504**
See LANDLORD AND TENANT.

—— Solicitor—Unqualified person—Motion for payment into Court—Summary jurisdiction – – – – – **520**
See SOLICITOR. 4.

EXCHANGE—Limited company—Surrender of shares—Exchange for new shares—No reduction of capital involved—Validity
See COMPANY. 8. **609**

EXECUTOR — Attachment — Judgment against executor "de bonis propriis"—Determination of fiduciary relation—Debtors Act – – – – – – **348**
See ATTACHMENT.

—— Debt — Release — Cancellation — Advances by testator—Entries in testator's ledger —Appointment of debtor as executor—Will—Construction – – – **528**
See DEBT.

—— Will—Specific gift of foreign property—Executors and trustees — Assent of executors—Costs of realization—French succession duty – – – – **622**
See WILL. 12.

EXECUTORY DEVISE—Equitable limitations—Fee simple determinable on bankruptcy, &c.—"Male heir of the body"—Failure of issue – – – – – **422**
See WILL. 6.

FEES.
See under COSTS.

FIDUCIARY RELATION—Determination of—Attachment—Judgment against executor "de bonis propriis" — Debtors Act – – – – – – **348**
See ATTACHMENT.

FINANCE ACTS.
See REVENUE.

FIRE INSURANCE.
See INSURANCE (FIRE).

FIRES PREVENTION (METROPOLIS) ACT, 1774 – – – – – – **414**
See INSURANCE (FIRE).

FOOTPATH—Building estate—Deposited plan—Proposed road and footpath—Dedication —Intention – – – – **633**
See HIGHWAY. 1.

FORECLOSURE.
See under MORTGAGE.

FOREIGN DOCUMENT—Bankruptcy of debtor —Discharge—Statutory release – **394**
See ADMINISTRATION.

FOREIGN PROPERTY—Specific gift of—Will—Executors and trustees — Assent of executors—Costs of realization—French succession duty – – – – **622**
See WILL. 12.

FRAUDS, STATUTE OF—Highway authority—Urban authority—Agreement to widen highway—Contract not under seal but executed—Contract over 50*l.* in value
See LOCAL GOVERNMENT. **452**

FRENCH LAW—Will—Specific gift of foreign property — Executors and trustees — Assent of executors—Costs of realization—French succession duty – **622**
See WILL. 12.

FRIENDLY SOCIETY –Trade union — Rules—Expulsion of member — Ultra vires — Injunction — Illegal association — Branches – – – – – **371**
See TRADE UNION.

GARNISHOR—Mortgagee of house destroyed by fire—Right to have insurance money applied in rebuilding — Priority over rights of garnishor – – – **414**
See INSURANCE (FIRE).

GUARANTEE—Banking account guaranteed by testator — Mortgaged property specifically devised – – – – **251**
See MORTGAGE. 1.

HEADMASTER.
See under MASTER.

HIGHWAY — *Dedication — Building Estate — Deposited Plan—Proposed Road and Footpath—Intention—User by Public—Extent of Dedication —Adjoining Owner—Right of Access to Highway.*

The defendant laid out and developed his property as a building estate in accordance with a plan submitted to and approved by the plaintiffs. The plan shewed a proposed road bounded on the north by the boundary fence of the plaintiffs' park, and having, on either side of it, dotted lines indicating intended footpaths forming part of the road, which, in accordance with the by-laws, was of the total width of forty feet. The defendant built houses on the southern side of the road overlooking the plaintiffs' boundary fence and made up and metalled the road for one half of its width next to the houses. The further or northern half of the road next to the plaintiffs' fence was left unmetalled and untouched. The defendant subsequently removed the hoarding from the end of the road, and the evidence shewed that for some three years before action brought the road, which connected two public highways, had been uninterruptedly used as a thoroughfare by pedestrians, cyclists, and vehicular traffic unconnected with residents in the road, the metalled part being used in preference to the unmetalled part.

The plaintiffs had recently opened a gate in their boundary fence and were carting building materials across the unmetalled portion of the road and the part intended to be appropriated for a footpath. The defendant objected on the ground that the unmetalled portion was not subject to any public right of way and that, even if it were, the plaintiffs were not entitled to take their carts over the part appropriated solely for the purposes of a footpath:—

Held, affirming the decision of Joyce J.:—

1. That the intention indicated by the deposited plan to make and dedicate a public highway had been completed by the subsequent uninterrupted user of the road by the public, and that there had been a dedication not merely of the metalled portion but of the whole width of the road as a highway for all purposes, notwithstanding the proposed appropriation of part of it as a footpath for the convenience of the public generally; and

2. That the plaintiffs, having, as adjoining owners, a private right attached to their property to gain access to the highway, were entitled at reasonable times and to a reasonable extent to cross on foot or with vehicles the portion of the highway appropriated for a footpath. TOTTENHAM URBAN DISTRICT COUNCIL *v.* ROWLEY **C. A. 633**

2. —— *Dedication — Railway Company — Land vested in Railway Company for Purposes of their Undertaking—Lines of Rails—Sidings—Power of Railway Company to dedicate—Ultra vires—Evidence of User immaterial—Special Act—Extinguishment of Public Rights—Compulsory Powers—Land acquired by Agreement —Right of Way.*

A railway company cannot grant, and therefore cannot dedicate, to the public a perpetual right of way over and across their lines of rails or over land acquired by them for the purposes of their undertaking and which is required or intended, and would naturally come to be used, for lines of rails.

Where a railway company, in pursuance of the powers conferred by their special Act, acquired a section of a public road for the purposes of laying across it and working lines of rails for traffic and sidings, and the public rights of way over the land so acquired were legally extinguished, evidence of subsequent trespass and user by the public will not avail to establish a re-dedication to the public of a right of way over the land in question inconsistent with the user of the land by the railway company for the purposes for which they acquired it.

A railway company were empowered by a special Act (incorporating the Lands Clauses Consolidation Acts) to enter upon, take, use and appropriate to the purposes of their undertaking certain land which was subject to public rights of way. By s. 37 of the special Act it was provided that "all rights of way over any of the lands which shall under the compulsory powers of this Act be purchased or acquired shall be and the same are hereby extinguished." The com-

HIGHWAY—*continued.*

pany purchased and acquired the land by agreement from the respective owners, no notice to treat being previously served:—

Held, that the section applied only to land which was in fact acquired by the exercise of compulsory powers, and did not extend to land acquired by agreement under the provisions or powers of the special Act; and that the public rights of way had not been extinguished over the land acquired by agreement. GREAT CENTRAL RAILWAY COMPANY *v.* BALBY-WITH-HEXTHORPE URBAN DISTRICT COUNCIL. ATTORNEY-GENERAL *v.* GREAT CENTRAL RAILWAY COMPANY – – – – – **Joyce J. 110**

—— Urban authority — Highway authority — Agreement to widen highway—Contract not under seal but executed—Contract over 50*l.* in value—Statute of Frauds
See LOCAL GOVERNMENT. **452**

HUSBAND AND WIFE — Partition action — Order for sale — Conversion — Married woman—No request for sale—Death of husband – – – – – **268**
See PARTITION.

IMPROVEMENTS—Settled land.
See under SETTLED LAND.

INCLOSURE ACT—*Lords of the Manor—Recital of Title—Commons and Wastes—Underlying Minerals—Compensation for Rights "in and to the soil"—Saving Clause—Allotments in Fee Simple—Whether Minerals reserved—Norton Inclosure Act*, 1814 (54 *Geo.* 3, *c. cxxxvi.*), *preamble; ss.* 12, 17, 28, 66.

A special Inclosure Act, which incorporated the Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), recited that the plaintiffs as the lords of a manor were "the owners of the soil of the commons and wastes within the manor, and of the mines and minerals therein," and directed that a certain portion of the commons and wastes should be allotted to the plaintiffs as lords of the manor as a full compensation for "their right to the soil of the said commons and wastes," and that the residue of the commons and wastes should be allotted to and amongst the persons having right of common on the commons and wastes, and directed that all parties should hold their respective allotments in severalty freed and discharged from all rights of common, and saved to the plaintiffs all their estates rights and interests in the commons and wastes directed to be inclosed except such rights and interests as the inclosure thereby authorized required to be barred, destroyed, or extinguished. Excepting the above recital, the Act and the award were silent as to mines and minerals:—

Held, that the word "soil" was used throughout the Act not in its widest sense but in the restricted sense of the service of the soil, and that the allottees of the commons and wastes took an estate in fee simple only in the surface of their allotments, the underlying mines and minerals being reserved to the lords. MASTER AND FELLOWS OF ST. CATHARINE'S COLLEGE, CAMBRIDGE *v.* GREENSMITH – **Neville J. 280**

INDEMNITY—Lease—Assignments—Assignee's covenant to indemnify assignor—Third party notice to indemnify—Assignment as "beneficial owner"—Implied covenants for title – – – – **504**
See LANDLORD AND TENANT.

INDIA — Design — Infringement — Sale in the United Kingdom for shipment to India
See DESIGN. **602**

INFRINGEMENT—Design.
See DESIGN.

INSURANCE (FIRE) — *Mortgagee of House destroyed by Fire — Right to have Insurance Money applied in Rebuilding—Priority over Rights of Garnishor—Insurance "effected under the mortgage deed"—Fires Prevention (Metropolis) Act*, 1774 (14 *Geo.* 3, *c.* 78), *s.* 83—*Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 23, *sub-s.* 3.

By a deed executed in November, 1911, B. charged a house in Walthamstow with payment to C. of a sum of money and covenanted to insure and keep insured the mortgaged property against fire in a certain amount. Prior to the charge the property had been insured by B. under an annual policy expiring at Christmas, and after the date of the charge B. renewed the policy for the ensuing year. In February, 1912, the house was destroyed by fire, and in May, 1912, S., a judgment creditor of B., obtained a garnishee order nisi attaching the money due under the policy. After the date of the order C. served the insurance company with notice that he required the money to be applied in rebuilding the house, and at the hearing of an application to make the order absolute his counsel insisted on this being done:—

Held, (1.), following *Ex parte Gorely* (1864) 4 D. J. & S. 477, that s. 83 of the Fires Prevention (Metropolis) Act, 1774, giving interested persons the right to have insurance moneys expended in rebuilding, was of general as opposed to local application; (2.) that, notwithstanding the doubt expressed by Lord Selborne in *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888) 13 App. Cas. 699, 714, the same section applied so as to enable a mortgagee to require the money to be expended in rebuilding; (3.) that the policy was, within the meaning of s. 23, sub-s. 3, of the Conveyancing Act, 1881, "effected under the mortgage deed," and, therefore, C. had a similar right under that provision; and (4.) that the mortgagee's rights were not displaced by the garnishee order nisi. SINNOTT *v.* BOWDEN – – **Parker J. 414**

INSURANCE (LIFE)—Company—Memorandum of association—"Business of life assurance" prohibited — Bond investment policy—Ultra vires – – – **581**
See COMPANY. 5.

—— Joint tenancy—Chose in action—Policy of assurance—Premiums paid by one joint tenant at request of the other—Set-off —Equity—Lien—Assignment by one joint tenant—Effect – – – **648**
See JOINT TENANCY.

INSURANCE (NATIONAL)—*Church of England Curates—Employment—Contract of Service—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 1, *sub-ss.* 1, 3; *s.* 66, *sub-s.* 1 (iii.); *First Schedule, Part I.* (*a*).

In order to make insurance obligatory under Part I. of the National Insurance Act, 1911, there must be something in the nature of a contract of service.

The position of a curate in the Church of England, whether he is formally licensed by the bishop under seal or is a mere probationer under the bishop's temporary permission, is that of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract. Therefore the relation between the incumbent and the curate, or the bishop and the curate, is not the relation of employer and employed, and the curate is not compulsorily insurable under the Act.

Quære whether the curate, in either case, could come in under the Act as a voluntary contributor. *In re* EMPLOYMENT OF CHURCH OF ENGLAND CURATES. *In re* NATIONAL INSURANCE ACT, 1911 – – – **Parker J. 563**

INTERPLEADER—*Right to issue Interpleader Summons after Final Judgment in the Action—Practice—Rules of the Supreme Court*, 1883, *Order LVII., r.* 1 (*a*).

Interpleader is not allowable where final judgment has been given by consent, and no other proceeding in the same matter is pending.

So *held*, reversing the decision of Eve J. H. STEVENSON & SON, LIMITED *v.* BROWNHILL. HEALY AND OTHERS, CLAIMANTS – **C. A. 344**

INTESTACY — Realty — Devise—Life estate—Remainder to "my nearest male heir" — "My nearest and eldest male relative"—No male heir—Heiress-at-law – – – – – – **430**
See WILL. 10.

IRELAND —Setlled land—Contract for sale—Land in Ireland—Order of Court in Ireland appointing trustees—Purchase of land in England—Capital moneys—Purchaser's right to inquire into source of – – – – – – **141**
See VENDOR AND PURCHASER. 4.

JOINT TENANCY—*Chose in Action—Policy of Assurance—Premiums paid by one Joint Tenant at Request of the other—Set-off—Equity—Lien—Assignment by one Joint Tenant—Effect.*

In 1892 the plaintiff and her husband effected in their joint names a policy of assurance on their joint lives to be payable upon the death of whichever of them should first die. They had previously agreed that each should pay one half of the annual premiums, and in some years the premiums were so paid, but the husband from time to time became unable to pay his moiety, and then the plaintiff at his request paid it for him out of her own moneys. They both concurred in creating charges upon the policy, and subsequently the husband executed a deed of assignment for the benefit of his creditors, assigning all his property, but not specifically

JOINT TENANCY—*continued.*

mentioning the policy, to the defendant as trustee. No notice of this deed was given to the insurance company. At the time of the husband's death the aggregate of the premiums paid by the plaintiff on his behalf exceeded in amount one moiety of the balance of the policy moneys remaining after payment of the joint charges.

Upon a summons to determine the respective rights and interests of the plaintiff and defendant:—

Held, that, the plaintiff being the legal owner of the policy, the defendant, whose only claim was in equity, must do equity; and that the plaintiff was entitled to set off her claim against her husband for the portion of the premiums paid on the policy by her at his request.

Held, further, that the plaintiff, one of the joint owners of the policy, having paid premiums at the request and on behalf of the other co-owner, was, in the circumstances, entitled to a lien on the policy moneys for the premiums so paid by her.

Quære whether in the circumstances the deed of assignment transferred or conveyed to the defendant any interest whatever, either legal or equitable, in the policy or the moneys thereby secured, although, *semble*, it might have passed to the defendant the right to all the policy moneys if the husband had survived the plaintiff. *In re* MCKERRELL. MCKERRELL *v.* GOWANS **Joyce J. 648**

JURISDICTION—Service out of jurisdiction—Action to perpetuate testimony – **21**
See PRACTICE.

—— Solicitor—Unqualified person—Motion for payment into Court—Summary jurisdiction – – – – – **520**
See SOLICITOR. 4.

LANDLORD AND TENANT—*Lease—Power to determine on Notice—Covenants—Assignments—Assignee's Covenant to indemnify Assignor—Notice to determine by Equitable Owner of Lease—Outstanding Legal Estate—Breaches of Covenant—Conditions Precedent—Invalid Notice—Estoppel—Third Party Notice to indemnify—Assignment as "Beneficial Owner"—Implied Covenants for Title—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (A)—*Rectification of Assignment.*

Where a lease contains the usual power for the lessee to determine it at the expiration of the first seven or fourteen years of the term on giving a six months' previous notice in writing, such notice in order to be valid must be given by or on behalf of the person in whom the lease is legally vested at the date of the notice.

Dictum of Channell J. in *Seaward* v. *Drew* (1898) 67 L. J. (Q.B.) 322, 324, that such a notice, if given by the person who has the whole equitable interest in the lease, would be valid, dissented from.

Jones v. *Phipps* (1868) L. R. 3 Q. B. 567, explained.

A lease for a term reserved rent payable quarterly with a stipulation that the last payment of rent should be made in advance one

LANDLORD AND TENANT—*continued.*

month before the determination of the tenancy. The lease contained a proviso that the lessee might determine the lease at the end of the first seven or fourteen years on giving six months' previous notice in writing, and that if the lessee should give the notice, and should pay all the rent and perform all the covenants "up to such determination," then the lease should cease and be void. An assignee of the lease gave notice to determine the lease at the end of the first seven years:—

Held, following *Grey* v. *Friar* (1854) 4 H. L. C. 565, that the conditions of the proviso were conditions precedent to the determination of the lease, and that their non-observance invalidated the notice.

Dictum of Channell J. in *Seaward* v. *Drew*, supra, on a somewhat similar proviso, to the effect that, if such a notice is otherwise valid, the lessee's covenants may be performed after the determination of the term, dissented from.

A contract for the sale of a lease contained a condition that the vendor should not be required to get in an outstanding bare legal estate nor to obtain the concurrence in the purchaser's conveyance of the person in whom such estate was vested. The conveyance, which was in common form, did not refer to the condition, and the vendor conveyed "as beneficial owner," thereby incorporating the covenants for title in s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881. The purchaser some years afterwards under a power in the lease gave the lessors notice to determine it at the expiration of the first seven years of the term, but the notice was held to be invalid because it was not given by the person who had the legal estate in the term. The purchaser then sued the vendor for damages for breach of his covenants for title:—

Held, that the vendor was entitled to have the conveyance rectified by inserting therein a proviso excluding any liability on his part by reason of the legal estate in the term being outstanding. STAIT *v.* FENNER. **Neville J. 504**

LAPSE — Charitable legacy—Scheme—Alteration of objects of charity—Destruction of endowed charity – – – **488**
See CHARITY. 2.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

—— Order of Master — Purchase of freehold reversion — Merger — Devolution — Rights of heir and next of kin – **365**
See LUNACY.

—— Settled land—Power to lease lands—Unopened mines—Proportion of rents to be set aside as capital — Contrary intention – – – – – **90**
See SETTLED LAND. 2.

LEASEHOLD PROPERTY—Open contract to sell—Breaches of lessee's covenants—Receipt for rent – – – **381**
See VENDOR AND PURCHASER. 2.

LEASEHOLDS—First and second mortgages—Sub-demise—Concurrent legal terms—Payment off of second mortgage—Surrender of term – – – **105**
See MORTGAGE. 3.

—— Will—"Rents, issues and profits"—Enjoyment in specie—Conversion – **312**
See WILL. 11.

LEGACIES.
See under WILL.

LEGACY DUTY.
See under REVENUE.

LIEN—Policy of assurance—Premiums paid by one joint tenant at request of the other—Set-off—Equity—Assignment by one joint tenant—Effect – – – **648**
See JOINT TENANCY.

LIFE INSURANCE.
See INSURANCE (LIFE).

LIGHT—*Ancient Lights—Obstruction—Measure of Damages—Site Value.*

The plaintiff was the owner of two houses fronting upon a street, and the windows facing the street were ancient lights. He was also the owner of a piece of land immediately at the rear of and adjoining the houses. The defendants erected a building on the opposite side of the street and thereby obstructed the plaintiff's ancient lights. In an action for damages it appeared that the plaintiff's houses were old and dilapidated and would soon have to be demolished; that the neighbourhood was no longer residential, but adapted for factories and workshops; that the site of the houses, together with the piece of land at the rear, would form a building site suitable for a warehouse or factory; and that the value of this building site as a whole would be diminished by the obstruction to light in the front:—

Held, that the damages recoverable by the plaintiff were not limited to the depreciation in the value of the houses, but extended to the diminution in value of the whole of the plaintiff's premises considered as one building site.

Decision of Neville J. [1912] 1 Ch. 291, affirmed. GRIFFITH *v.* RICHARD CLAY & SONS, LIMITED – – – – – **C. A. 291**

LIMITATIONS—Equitable—Fee simple determinable on bankruptcy, &c.—Executory devise—"Male heir of the body"—Failure of issue – – – – **422**
See WILL. 6.

LIMITATIONS, STATUTE OF — Vendor and purchaser—Contract—Possessory title—Title forced on purchaser – **1**
See VENDOR AND PURCHASER. 1.

LIMITED COMPANY.
See COMPANY.

LOCAL AUTHORITY—Solicitor—Costs—Taxation — Common order — Propriety of expenditure qua ratepayers—Province of taxing Master – – – **98**
See SOLICITOR. 1.

LOCAL GOVERNMENT — *Urban Authority — Highway Authority—Agreement to widen Highway—Contract not under Seal but executed—Contract over 50l. in Value—Statute of Frauds—Part Performance—Estoppel—Highway Act*, 1864 (27 & 28 *Vict. c.* 101), *ss.* 47, 48, 53—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 154, 173, 174.

Sect. 174 of the Public Health Act, 1875, is not limited to contracts made for work to be done for or goods to be supplied to an urban authority, but applies to every contract made by an urban authority under any of the powers created by that Act.

The plaintiff deposited plans with the defendants for erecting thirty-six houses on his land, which was in the defendants' district and on one side adjoined a narrow highway, and at the instance of the defendants altered his plans and signed an agreement, purporting to be made between himself and the defendants, whereby he agreed to remove his boundary fence and to throw a strip of land into the highway the whole length of his frontage so as to widen the highway to a uniform width of forty feet, and the defendants, in consideration of his so doing, agreed at their expense to make up and adopt the strip of land as a highway. Matters proceeded on the footing that the agreement was binding on both parties. The plaintiff built his houses and fulfilled his part of the agreement and gave possession of the strip of land to the defendants, who took possession of it, but did not make it up or adopt it as a highway. To an action by the plaintiff to compel the defendants specifically to perform their part of the agreement the defendants pleaded that the agreement could not be enforced against them because, as the fact was, it was not sealed by them nor signed by any one on their behalf, and they relied on the provisions of the Public Health Act, 1875, and also on the Statute of Frauds :—

Held, that the agreement was a contract to widen a highway made by the defendants, not as a highway authority, but as an urban authority under the powers vested in them by s. 154 of the Public Health Act, 1875.

Held, also, that the contract, being over 50*l.* in value, required to be sealed by the defendants pursuant to s. 174 of the Act.

Held, also, that as the contract had been partly performed, the Statute of Frauds afforded no defence to the action.

But *held*, also, that the defendants were not in any way estopped from relying on the fact that the contract was not under seal and therefore was not binding upon them.

The action was accordingly dismissed, but without costs. HOARE *v.* KINGSBURY URBAN DISTRICT COUNCIL – – **Neville J. 452**

LONDON—Insurance (Fire)—Mortgagee of house destroyed by fire—Right to have insurance money applied in rebuilding—Fires Prevention (Metropolis) Act, 1774
See INSURANCE (FIRE). **414**

—— Water—Rate—Quinquennial valuation—Provisional list—Supplemental list **546**
See WATER.

LUNACY—*Person of Unsound Mind not so found by Inquisition — Receiver — Lease — Order of Master — Purchase of Freehold Reversion — Merger—Devolution—Rights of Heir and Next of Kin.*

By an order made by a Master in Lunacy, in the matter of a person of unsound mind not so found by inquisition, a receiver of the lunatic's estate was given liberty, on behalf of the lunatic, to purchase the reversion in fee of leasehold hereditaments (held for a term which by effluxion of time would expire in 1929) in consideration of the payment of a perpetual yearly rent-charge, and it was ordered that the lease (which was vested in a trustee for the lunatic for life, remainder for one for life who predeceased the lunatic, remainder for the lunatic absolutely) might be delivered up to be cancelled.

By an indenture, which was settled by the Master, and bore the seal of the Lunacy Office, and was executed by the receiver on behalf of the lunatic, the hereditaments were granted, subject to the yearly rent-charge to issue thereout, to the use of the trustee (in whom the lease was vested) as purchaser in fee simple.

On the death of the lunatic a question arose whether the leasehold hereditaments had been "converted into real estate" and passed to the heir, or whether they went to the next of kin, the order being silent as to preserving the rights of next of kin :—

Held, that the leasehold term had merged in the freehold reversion, and the hereditaments, being in fact freehold at the death of the lunatic, passed to her heir. *In re* SEARLE. RYDER *v.* BOND – – – – – **Joyce J. 365**

MALE—"Male heir of the body"—Will—Construction – – – – – **422**
See WILL. 6.

—— "My nearest and eldest male relative"—"My nearest male heir" – – **430**
See WILL. 10.

MANAGER—School—Defect in appointment or qualification of any manager – **256**
See SCHOOLS.

MANSION-HOUSE—Rebuilding—New carriage drive – – – – – **75**
See SETTLED LAND. 1.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARSHALLING—Will—Payment of mortgage debt — Deficiency—Liability of residuary estate – – – – **86**
See WILL. 5.

MASTER—Headmaster—Dismissal — Managing body – – – – – **356**
See SCHOOLS.

MEDICAL OFFICER (DISTRICT)—Public vaccinator—Salary or wages and emoluments – – – – – **154**
See POOR LAW OFFICER.

MEETING — Company — General meeting — "Extraordinary resolution"—Power of majority to bind minority—Power to sanction modification of rights – **125**
See COMPANY. 3.

—— Company — Persons entitled to make requisition — Requisition in several documents—"Like form" – – **52**
See COMPANY. 4.

MEMBER—Trade union—Rules—Expulsion of member—Ultra vires—Injunction—Illegal association—Branches—Delegates
See TRADE UNION. **371**

MERGER—Lease—Order of Master—Purchase of freehold reversion — Devolution — Rights of heir and next of kin – **365**
See LUNACY.

METROPOLIS.
See LONDON.

METROPOLITAN WATER BOARD (CHARGES) ACT, 1907 – – – – **546**
See WATER.

MINE—Inclosure Act—Lords of the manor—Underlying minerals — Compensation for rights "in and to the soil"—Saving clause—Whether minerals reserved **280**
See INCLOSURE ACT.

—— Settled land—Power to lease "lands"—Unopened mines—Will—Construction
See SETTLED LAND. 2. **90**

MISTAKE—Tithe—Bankruptcy of incumbent—Sequestration of benefice—Recovery of tithes paid by mistake of fact—Liability of bishop – – – – – **318**
See TITHES.

MORTGAGE—*Banking Account guaranteed by Testator — Mortgaged Property specifically devised—Real Estate Charges Act*, 1854 (*Locke King's Act*, 17 *&* 18 *Vict. c.* 113), *s.* 1

A testator by his will made in 1900 specifically devised to his son A. certain freehold property, and died in 1912. In 1899 he had given to his bankers a memorandum charging this property with all moneys for the time being due and owing from him on any account whatever, having then an account at the bank (used for the purposes of his business), which he was afterwards allowed to overdraw. The testator being incapacitated by illness, A. early in 1902 took over the management of the business on the testator's behalf, and the account, then in credit, was transferred into the names of A. and a daughter of the testator. In September, 1902, the bank allowed A. to overdraw the account on the testator giving a guarantee for the overdraft. In 1907 the account, then in debit, was, at the testator's request, transferred into the names of A. and another daughter of the testator, the testator giving the bank a document whereby he requested the bank to permit A. and the daughter to overdraw and guaranteed payment of all moneys then or thereafter due on the general balance of their account or for advances or otherwise. At the testator's death the guaranteed account was in debit, but the debit balance was afterwards paid out of his personal estate:—

Held, that the charge of 1899 included all money due or capable of becoming due by the testator to the bank under the guarantee of 1907; that the testator was in substance and in fact the principal debtor for the amount overdrawn at his death; and, therefore, that Locke King's Act applied, and the freehold property specifically devised to A. must bear the charge for that amount to the exoneration of the personal estate.

If in substance as well as form the testator had been merely a surety for the payment of the debit balance, and the principal debtor had paid it off after the testator's death, Locke King's Act would not have applied. *In re* HAWKES. REEVE *v.* HAWKES – – **Parker J. 251**

2.—— *Foreclosure Action — Practice — Plaintiff Trustees—Change of Trustees after Foreclosure Absolute—Opening Foreclosure—Revivor—Adding Parties—Notice of Intention to proceed—Application to set aside Proceedings for Irregularity — Rules of the Supreme Court*, 1883, *Order* XVII., *rr.* 1, 4; *Order* LXIV., *r.* 13; *Order* LXX., *r.* 3.

In a foreclosure action brought by the public officer and estate trustees of an insurance society a final order for foreclosure absolute was made on December 3, 1907. Two of the trustees died after that date. New trustees had been appointed in their places and the mortgaged estates vested in them. W., one of the defendants, being desirous of making an application to open the foreclosure, presented a petition of course for an order of revivor, and an order was made in chambers that the action should for the future be carried on between W. as plaintiff and the surviving defendants and the new trustees as defendants:—

Held, on motion to discharge this order, that there could not be a revivor under the modern practice, and the right course would have been for W. to apply to the trustees for their consent to the new trustees being added as plaintiffs, and, if they refused, to apply under Order XVII., r. 4, to have them added as defendants. The order was discharged. PENNINGTON *v.* CAYLEY **Swinfen Eady J. 236**

3.——*Leaseholds—First and Second Mortgages—Sub-demise—Concurrent Legal Terms—Payment off of Second Mortgage—Surrender of Term—Satisfied Terms Act*, 1845 (8 *&* 9 *Vict. c.* 112).

Leaseholds were mortgaged by a sub-demise for the residue of the original term except the last day. Afterwards by another mortgage they were sub-demised to a second mortgagee for the residue of the original term except the last day, subject to the first mortgage. The second mortgage was paid off during the continuance of the first mortgage and the mortgage deed handed back to the mortgagor. A purchaser of the leaseholds from the mortgagor declined to complete without a formal surrender being obtained of the term created by the second mortgage:—

MORTGAGE—*continued.*

Held, that by the second mortgage there was vested in the mortgagee a legal term which was not determined nor revested in the mortgagor by mere repayment of the principal money and interest, and that the purchaser was entitled to require a surrender or assignment of the outstanding residue of the term created by the second mortgage.

Held, further, that the Satisfied Terms Act, 1845, does not apply to a mortgage term created by the sub-demise of leaseholds. *In re* MOORE AND HULM'S CONTRACT - - **Joyce J. 105**

—— Insurance (Fire) — Mortgagee of house destroyed by fire—Right to have insurance money applied in rebuilding **414**
See INSURANCE (FIRE).

—— Receiver—Appointment in second mortgagee's action—First mortgagees not parties—Claim by first mortgagees for possession—Rents - - - **497**
See RECEIVER.

—— Solicitors' costs—Scale fees—Mortgage to bank for unnamed amount—"Completed mortgage" - - - **405**
See SOLICITOR. 2.

—— Will—Payment of mortgage debt—Deficiency—Liability of residuary estate
See WILL. 5 **86**

NATIONAL INSURANCE.
See INSURANCE (NATIONAL).

NEAREST OF KIN—Gift to nearest of kin of deceased husband and wife—Will—Construction - - - - **467**
See WILL. 8.

NEXT OF KIN—Gift to nearest of kin of deceased husband and wife - - - **467**
See WILL. 8.

NORTON INCLOSURE ACT, 1814 - - **280**
See INCLOSURE ACT.

NOTICE — Lease — Determination — Conditions precedent—Invalid notice—Estoppel
See LANDLORD AND TENANT. **504**

"OR"—Will—Construction—Reading "or" as "and"—Gift over - - - **335**
See WILL. 9.

PARTIES—Attorney-General's right to appeal—Charitable legacy - - - **488**
See CHARITY. 2.

PARTITION—*Partition Action—Order for Sale—Conversion—Person sui juris at Date of Order—Person subsequently becoming sui juris—Married Woman—No Request for Sale—Death of Husband—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 8—*Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6—*Leases and Sales of Settled Estates Act*, 1856 (19 & 20 *Vict. c.* 120), *ss.* 23, 24, 25.

Notwithstanding the incorporation of ss. 23 to 25 of the Settled Estates Act, 1856, in s. 8 of the Partition Act, 1868, an order for sale under the Partition Acts converts the share of a person absolutely entitled and sui juris at the date of the order into personalty.

In re Barker (1881) 17 Ch. D. 241; *In re Pickard* [1885] W. N. 137; 53 L. T. 293; *Arnold* v. *Dixon* (1874) L. R. 19 Eq, 113; 23 W. R. 314; *Mordaunt* v. *Benwell* (1881) 19 Ch. D. 302; *In re Dodson* [1908] 2 Ch. 638; and *Fauntleroy* v. *Beebe* [1911] 2 Ch. 257, discussed and applied.

The share of a married woman originally unconverted for want of a formal request for sale under s. 6 of the Partition Act, 1876, is not subsequently converted by the mere fact of her becoming discovert. HERBERT *v.* HERBERT **Swinfen Eady J. 268**

PATENT—*Practice — Costs — Taxation — Action for Infringement of Three Patents—Abandonment of Two of Patents at Trial—Costs of Particulars of Objections to Abandoned Patents—Rules of the Supreme Court*, 1883, *Order* LIII.A, *r.* 22.

An action was brought by the plaintiffs for the infringement of three patents. At the trial the plaintiffs elected not to proceed with the action so far as it related to two of the patents. The action was tried on the third patent and was dismissed with costs:—

Held, that the action did not "proceed to trial" on the two abandoned patents within the meaning of r. 22 of Order LIII.A, and that the costs of the defendants' particulars of objections to those patents were in the discretion of the taxing Master.

Babcock & Wilcox, Ld. v. *Water Tube Boiler and Engineering Co.* (1910) 27 Rep. Pat. Cas. 626, followed.

May v. *Yuill & Co.* (1910) 27 Rep. Cas. 525, not followed. BRITISH, FOREIGN AND COLONIAL AUTOMATIC LIGHT CONTROLLING COMPANY, LIMITED *v.* METROPOLITAN GAS METERS, LIMITED - - - - **Warrington J. 82**

PATENTS AND DESIGNS ACT, 1907 - **602**
See DESIGN.

PAYMENT INTO COURT—Motion for—Solicitor—Unqualified person—Summary jurisdiction - - - - - **520**
See SOLICITOR. 4.

PERPETUATE TESTIMONY—Action to—Writ—Service out of jurisdiction—Subject-matter of action - - - **21**
See PRACTICE.

PERPETUITY—Power—Divisibility - **622**
See WILL. 12.

PLANS—Building plans to be approved by vendor's surveyor—Costs of approval **42**
See VENDOR AND PURCHASER. 3.

POLICY—Life insurance.
See INSURANCE (LIFE).

—— National insurance.
See INSURANCE (NATIONAL).

POOR LAW OFFICER—*District Medical Officer —Public Vaccinator—Poor Law Officers' Superannuation Act*, 1896 (59 & 60 *Vict. c.* 50), *ss.* 2, 3, 4, 19—"*Officer or servant*"—*Salary or Wages and Emoluments—Vaccination Acts*, 1853 (16 & 17 *Vict. c.* 100), *s.* 6; 1867 (30 & 31 *Vict. c.* 84), *ss.* 4, 6, 7.

A public vaccinator appointed by a board of guardians under the Vaccination Acts is not "an officer or servant in the service or employment" of the guardians within the meaning of the Poor Law Officers' Superannuation Act, 1896, but is a contractor who has contracted with them for the performance of certain work for certain fees. A district medical officer who is also a public vaccinator is not entitled to bring in his fees for vaccination as part of the "salary and emoluments" upon which the superannuation allowance to which he is entitled under that Act is calculated. LAWSON *v.* MARLBOROUGH UNION - - - - **Neville J. 154**

POSSESSORY TITLE — Title forced on purchaser—Statute of Limitations - **1**
See VENDOR AND PURCHASER. 1.

POWER—Divisibility—Perpetuity - - **622**
See WILL. 12.

PRACTICE—*Writ—Service out of Jurisdiction—Action to perpetuate Testimony—Subject-matter of Action—Land within the Jurisdiction—Rules of the Supreme Court, Order* XI., *r.* 1 (*a*), (*c*).

Where an action to perpetuate testimony is brought with a view to obtaining and preserving evidence to be used in a future action to establish a title to land situate within the jurisdiction, service of the writ out of the jurisdiction cannot be allowed under Order XI., r. 1 (*a*), the whole subject-matter of the action not being land, but evidence. SLINGSBY *v.* SLINGSBY - **C. A. 21**

PREFERENCE SHARES—Company—Distribution of profits—Rights of shareholders inter se - - - - - **571**
See COMPANY. 9.

PRIORITY — Building society — Priorities in winding-up - - - - **183**
See BUILDING SOCIETY.

—— Company — Preference shares — Distribution of profits — Ordinary shares — Rights of shareholders inter se - **571**
See COMPANY. 9.

—— Company — Purchase of property by — Advance of purchase-money—Equitable charge on property so purchased — Deposit of title deeds- - - **25**
See COMPANY. 2.

—— Insurance (Fire) — Mortgagee of house destroyed by fire—Right to have insurance money applied in rebuilding—Priority over rights of garnishor - **414**
See INSURANCE (FIRE).

—— Will — Charitable legacies — Priority of payment - - - - - **241**
See WILL. 2.

PUBLIC HEALTH—Highway.
See HIGHWAY.

PUBLIC HEALTH—*continued.*

—— Solicitor—Costs—Local authority—Taxation between solicitor and client — Common order - - - - **98**
See SOLICITOR. 1.

PUBLIC POLICY—Condition subsequent—Condition against children living with or under the control of their father - **471**
See WILL. 4.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY—Highway—Dedication — Power of railway company to dedicate — Ultra vires—Special Act—Extinguishment of public rights—Right of way - **110**
See HIGHWAY. 2.

RATE—Water rate.
See WATER.

REAL ESTATE CHARGES — Banking account guaranteed by testator — Mortgaged property specifically devised - **251**
See MORTGAGE. 1.

—— Devise of mortgaged property — Payment of mortgage debt — Deficiency — Liability of residuary estate—Marshalling - - - - - - **86**
See WILL. 5.

REAL ESTATE CHARGES ACT, 1854 - **86**
See WILL. 5.

REAL PROPERTY LIMITATION ACT, 1833 **1**
See VENDOR AND PURCHASER. 1.

REBUILDING—Mansion-house—Improvements
See SETTLED LAND. 1. **75**

RECEIVER—*Appointment in Second Mortgagee's Action—First Mortgagees not Parties—Claim by First Mortgagees for Possession — Notice to Receiver and Tenants—Application to Court—Rents collected by Receiver between Notice and Application.*

A company having mortgaged leasehold flats to first mortgagees subsequently issued a mortgage debenture to a debenture-holder.

On February 1, 1912, the first mortgagees appointed A. as receiver under their statutory power, but did not give immediate notice to the tenants.

On February 2 the debenture-holder (the second mortgagee) obtained the appointment of B. as receiver in a debenture-holder's action to which the first mortgagees were not parties, and immediate notice was given to the tenants.

On February 8 the first mortgagees gave B. and the tenants notice of A.'s prior appointment and claimed the rents.

On February 27 the first mortgagees applied to the Court for liberty to take possession notwithstanding B.'s appointment, and on March 1 B. was ordered to give up possession :—

Held, that notwithstanding the appointment of A. on February 1 and the notice of February 8 the first mortgagees were not entitled to any

RECEIVER—*continued.*

rents collected by B. prior to their application of February 27.

Thomas v. *Brigstocke* (1827) 4 Russ. 64, 65; *In re Hoare* [1892] 3 Ch. 94, 100; and *Preston* v. *Tunbridge Wells Opera House, Ld.* [1903] 2 Ch. 322, 325, applied. *In re* METROPOLITAN AMALGAMATED ESTATES, LIMITED. FAIRWEATHER *v.* METROPOLITAN AMALGAMATED ESTATES, LIMITED. YORKSHIRE INSURANCE COMPANY, LIMITED *v.* METROPOLITAN AMALGAMATED ESTATES, LIMITED **Swinfen Eady J. 497**

—— Company — Debenture-holder's action — Costs out of assets – – – **305**
See COMPANY. 6

RECTIFICATION — Lease — Assignment—Rectification of assignment – – **504**
See LANDLORD AND TENANT.

REDUCTION OF CAPITAL—Company.
See under COMPANY.

—— Surrender of shares—Exchange for new shares—No reduction of capital involved—Validity – – – – **609**
See COMPANY. 8.

REGISTRATION—Trade mark.
See under TRADE MARK.

RELEASE—Debt—Bankruptcy of debtor—Discharge—Statutory release—Subsequent acknowledgment of debt – – **394**
See ADMINISTRATION.

—— Debt—Cancellation—Entries in testator's ledger — Appointment of debtor as executor – – – – – **528**
See DEBT.

RENT-CHARGES—Will—Devise of mortgaged property—Trust for sale reserving rent-charges—Payment of mortgage debt—Deficiency– – – – – **86**
See WILL. 5.

RENTS—Leasehold property—Open contract to sell—Breaches of lessee's covenants—Receipt for rent– – – – **381**
See VENDOR AND PURCHASER. 2.

—— Receiver—Appointment in second mortgagee's action—First mortgagees not parties—Claim by first mortgagees for possession—Rents collected by receiver . *See* RECEIVER. **497**

—— Rents and profits—Timber—Tenant for life and remainderman – – **339**
See SETTLEMENT.

—— "Rents, issues and profits"—Tenant for life – – – – – – **312**
See WILL. 11.

—— Settled land—Power to lease "lands"—Unopened mines—Proportion of rents to be set aside as capital—Contrary intention – – – – – **90**
See SETTLED LAND. 2.

REORGANIZATION — Company — Scheme of arrangement—Reduction of capital—Reorganization of share capital – **438**
See COMPANY. 7.

RESIDUARY ESTATE — Tenant for life — "Rents, issues and profits"—Leaseholds – – – – – **312**
See WILL. 11.

RESOLUTION—Company—Debenture-holders—Trust deed — Resolution of majority binding minority—Bribe – – **324**
See COMPANY. 1.

RESTRICTIVE COVENANTS.
See under COVENANT.

REVENUE — *Increment Value Duty — Settled Land—Provisional Valuations—Duty to check Valuations for Protection of Estate—Owner—Tenant for Life—Trustees—Discretion—Remainderman—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 27, *sub-ss.* 1, 2, 5.

Under a will certain property, consisting of freehold land divided into numerous plots on which houses had been built and now let on leases for long terms, stood limited to trustees upon trust for E. for life with remainder to S. in base fee. A number of provisional valuations had been made by the district surveyor under the Finance (1909–10) Act, 1910, for the purpose of assessing the increment value duty under the Act. S. applied to the trustees to take measures to check the provisional valuations and for that purpose to have valuations made. E. opposed this on the ground of expense. S. then applied to the Commissioners as a person interested under s. 27, sub-s. 5, of the Act that he might be supplied with copies of the provisional valuations, and this was promised. He then took out this summons for an order directing the trustees to have valuations made for the purpose of checking the valuations of the district surveyor. The only evidence in support of the application was an affidavit by a surveyor of standing and experience that the valuations under the Act were usually too low.

Neville J. held that on the true construction of the Act the duty of protecting the estate in the matter of these valuations was thrown on the owner (i.e., in the case of settled land, the tenant for life) and not on the trustees. Under s. 39 the trustees if they did interfere could charge their costs on the estate, but the Court would not direct the trustees to take proceedings except in a case where serious injury was threatened to the estate, and in this case there was no sufficient evidence of any such threatened injury.

Held, on appeal, that in the course of their ordinary duty trustees had to exercise their discretion in such cases; that the trustees in the present case had honestly exercised that discretion; and that there was no reason why the Court should interfere with it. *In re* KNOLLYS' TRUSTS. SAUNDERS *v.* HASLAM – **C. A. 357**

2. —— *Legacy Duty—Successive Interests—Bequest for Lives—Remainder to Contingent Class—Same Rate of Duty—Possible Intestacy*

REVENUE—*continued.*

—Next of Kin liable to Smaller Rate—Mode of Payment—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *ss.* 6, 12, 15, 17.

A testator bequeathed his residue to life tenants with remainder to a contingent class, so that there was a possible intestacy in the event of the contingent class failing.

The contingent class on becoming entitled would be chargeable with legacy duty at the same rate as the life tenants, but the statutory next of kin would be chargeable at a smaller rate:—

Held, (*a*) that, notwithstanding s. 17 of the Legacy Duty Act, 1796, the contingent bequest could not for the purpose of duty be treated as absolute, as that section was confined to cases where the legacy or residue was susceptible of retainer, delivery, payment, satisfaction, or discharge within s. 6.

(*b*) That under s. 15 the next of kin entitled under the possible intestacy must be treated as entitled in succession under the will.

(*c*) That the residue was therefore "given" to different persons in succession chargeable with different rates of duty within s. 12, and consequently the duty was not now payable out of capital, but the life interests were chargeable by way of annuity. *In re* DUPPA. FOWLER *v.* DUPPA - - - - **Swinfen Eady J. 445**

REVERSION—Lease—Order of Master—Purchase of freehold—Reversion—Merger—Devolution—Rights of heir and next of kin - - - - - **365**
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REVIVOR—Opening foreclosure—Adding parties—Notice of intention to proceed—Application to set aside proceedings for irregularity - - - - **236**
See MORTGAGE. 2.

RIGHT OF WAY,
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RULES OF THE SUPREME COURT:—
Order XI. (Service out of the Jurisdiction), r. 1 (a) - - - - **21**
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Order XVII. (Change of Parties by Death, &c.), rr. 1, 4 - - - **236**
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Order LXIV. (Time), r. 13 - - **236**
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Order LXX. (Effect of Non-compliance with Rules), r. 3 - - - **236**
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SCHEME OF ARRANGEMENT—Company.
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SCHOOLS—*Education—Non-provided School—Headmaster — Dismissal — Managing Body — Foundation Managers—Declaration as to Membership of Church of England—Churchwardens —Qualification — Residence — Validity of Appointment—Defect in Appointment or Qualification of any Manager — Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 6, 7, 11; *Sched. I., B* (3.).

The Final Order made by the Board of Education under the Education Act, 1902, in respect of a non-provided elementary Church of England school provided that the foundation managers should be members of the Church of England, and that no person should "be entitled to act as a foundation manager" until he had signed a declaration that he was a member of the Church of England.

At the date when the body of managers of the school in question purported to dismiss the headmaster, three of the foundation managers had not signed the required declaration.

Sched. I., B (3.), of the Education Act, 1902, provides that the proceedings of a body of managers "shall not be invalidated by any defect in the election, appointment, or qualification of any manager":—

Held, that the words of the Final Order did not amount to an absolute prohibition against any foundation manager acting until he had signed the declaration in question, and that the provision in Sched. I., B (3.), applied to validate the acts of the body of managers.

Objections were also taken to the validity of the appointment of the two nominated managers and of the co-optative manager:—

Held, that, having regard to the same provision in Sched. I., B (3.), any objections to the appointment of the three managers in question, founded upon any invalidity in the appointment of any of them, or the alleged want of authority in those who appointed them, did not invalidate the proceedings of the body of managers.

Held, therefore, that the notice dismissing the headmaster could not be impeached, and his action claiming a declaration that it was inoperative must be dismissed.

Quære, whether a non-resident parishioner elected to the office of churchwarden can be compelled to serve. MEYERS *v.* HENNELL.
Eve J. 256

SEDITIOUS MEETINGS ACT, 1817 - **371**
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SERVICE—Writ—Service out of jurisdiction—Action to perpetuate testimony—Subject-matter of action- - - **21**
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SET-OFF—Chose in action—Policy of assurance—Premiums paid by one joint tenant at request of the other—Lien—Assignment by one joint tenant—Effect - **648**
See JOINT TENANCY.

SETTLED ESTATES—Partition action—Order for sale—Conversion – – – **268**
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SETTLED LAND — *Improvements — Rebuilding Mansion-house—New Carriage Drive—"Annual rental of the settled land"—How to be ascertained—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25, *sub-s.* (*viii.*)—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*iv.*).

The alteration, reconstruction, and enlargement of a mansion-house where the original walls were retained but new wings were added to both the east and west ends of the old building :—

Held to be a rebuilding under s. 13, sub-s. (iv.), of the Settled Land Act, 1890.

The words "annual rental" in the proviso to sub-s. (iv.) must be read literally and means the total amount of the rents payable by the tenants to the landlord as appearing in the estate rent-book, subject to the modification that if any part of the land is temporarily unlet, it must for the purpose of the sub-section be treated as producing the rent which an occupying tenant would usually pay for it. In estimating the amount, therefore, of the "annual rental" no deductions can be made for mortgage interest, tithes, land tax, drainage rates, or rent-charges. Property tax, however, may be deducted.

A new carriage drive rendered necessary by reason of the building of a new wing of the mansion-house over the old carriage drive :—

Held to be a "private road" within s. 25, sub-s. (viii.), of the Settled Land Act, 1882. *In re* WINDHAM'S SETTLED ESTATE
Warrington J. 75

2. —— *Power to lease Lands — Unopened Mines—Will—Construction—Proportion of Rents to be set aside as Capital—Contrary Intention—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 11.

A power to lease "lands" does not enable the donee to lease unopened mines. A lease of unopened mines by trustees of a will and cestuis que trust which is not within a power in the will, and which could not be validly made out of the estates of the cestuis que trust, but which could be made under the Settled Land Acts, will be treated as made under those Acts, and three fourths of the rent and royalties must be set aside as capital. A direction in a will to pay the rents of unopened mines to a tenant for life is not an expression of a "contrary intention" within the meaning of s. 11 of the Settled Land Act, 1882. *In re* DANIELS. WEEKS *v.* DANIELS
Swinfen Eady J. 90

—— Contract for sale—Document prior in date to commencement of title—Sale by tenant for life—Capital moneys—Purchaser's right to inquire into source of – *See* VENDOR AND PURCHASER. 4. **141**

—— Increment value duty—Provisional valuations—Duty to check valuations for protection of estate—Owner—Tenant for life – – – – – **357**
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—— Partition action — Order for sale—Conversion—Married woman—No request for sale—Death of husband – **268**
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—— "Profits" — Rents and profits — Timber estate—Periodical cuttings—Tenant for life and remainderman – – **339**
See SETTLEMENT.

—— Will—Tenant for life—"Rents, issues and profits" — Leaseholds — Enjoyment in specie—Conversion – – – **312**
See WILL. 11.

SETTLEMENT—*Personal Estate, Settlement of —Power to Invest in Real Estate—Purchase by Trustees of Timber Estate—Rents and Profits — Periodical Cuttings—Tenant for Life and Remainderman.*

By a marriage settlement made in 1902 personal property of the wife was settled upon usual trusts, the wife taking the first life interest, and power was given to the trustees to sell any part of the trust premises and invest the proceeds in the purchase of freehold lands to be conveyed to the trustees upon trust for sale, and until sale the trustees were to pay the rents and profits to the person to whom the income of the trust premises invested in the purchase thereof would have been payable if such investment had not been made. In 1904 the trustees exercised this power and purchased an estate in the county of Buckingham, having a large number of beech trees on it. In the proper management of the estate the trustees had recently cut and sold a number of beech trees :—

Held, that the proceeds of sale arising from periodical cuttings, after deducting the expense of replanting and fencing incurred in a proper course of management, were net "profits" of the estate within the meaning of the settlement, and therefore payable to the tenant for life.

Dashwood v. *Magniac* [1891] 3 Ch. 306, followed. *In re* TREVOR-BATYE'S SETTLEMENT. BULL *v.* TREVOR-BATYE **Parker J. 339**

SHAREHOLDERS AND SHARES — Company. *See* under COMPANY.

"**SOIL**" — Inclosure Act — Compensation for rights "in and to the soil"—Whether minerals reserved – – – **280**
See INCLOSURE ACT.

SOLICITOR—*Costs—Local Authority—Taxation between Solicitor and Client—Common Order—Disbursements—Items incurred on Special Instructions — Usual Charges — No Question of Quantum—Propriety of Expenditure qua Ratepayers—Province of Taxing Master—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 247, 249.

In taxing a bill between solicitor and client under the Solicitors Act, 1843, s. 37, the taxing Master must allow disbursements for items incurred on the client's special instructions, and for which the usual charges are made, even though that client is a local authority.

SOLICITOR—*continued.*

The question whether the items are expenses that ought to be allowed as between the local authority and the ratepayers does not arise on such a taxation, but is a matter for the auditor under the Public Health Act, 1875, ss. 247, 249.

Southampton Guardians v. *Bell* (1888) 21 Q. B. D. 297, 300, applied.

In re Frank James & Sons [1903] W. N. 99, distinguished. *In re* PORTER, AMPHLETT & JONES - - - - **Swinfen Eady J. 98**

2. ——*Costs—Scale Fees—Mortgage to Bank for Unnamed Amount—"Completed Mortgage"—General Order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *r.* 2 (*a*); *Sched. I., Part I.*

Rule (2) (*a*) and Part I. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, apply not only to legal mortgages, but also to equitable mortgages, and memoranda of charge, though in some of those cases questions may arise, under particular circumstances, whether they fall within the scale, on the ground that the whole of the business in respect of which the scale imposes fees has not been done.

Although the scale only applies where the transaction has been "completed," the question in every case is whether there has been completion in substance; and although the scale does not apply where a mortgage is given to secure money which may or may not be advanced, at the option of the lender, yet where mortgagees have agreed to advance a certain fixed sum, and everything contemplated by the scale has been done except actually paying over the money, postponement of the payment of the money at the request of the mortgagor will not take the transaction out of the scale, although the mortgage itself—as in the ordinary case of a mortgage to a bank by a customer—does not state the amount secured.

The Court is not tied down by the form which the security takes, but is entitled to look at the substance of the transaction. *In re* BAKER - - - - - **Parker J. 405**

3.—— *Costs — Taxation — Bill of Costs delivered to Company—Voluntary Winding-up — Payment — Retainer of Amount — Delivery Twelve Months before Summons for Taxation.*

If a solicitor's bill of costs due from a limited company be delivered less than twelve months before the company is wound up it can be taxed at any time during the winding-up. Retainer by the solicitor of his costs out of moneys in his hands belonging to the client is not payment within the meaning of s. 41 of the Solicitors Act, 1843, unless there has been a settlement of account between the parties.

Taxation of costs in a winding-up whether voluntary or compulsory ought not to be made under the Solicitors Act, 1843, but under the general jurisdiction of the Court. It is ordered only as a means of ascertaining the amount of the solicitor's claim against the assets. The form should be that generally adopted in windings-up by the Court, in which there is no submission to pay, and as a rule the solicitor is

SOLICITOR—*continued.*

allowed to add the costs of taxation to his claim. *In re* FOSS, BILBROUGH, PLASKITT & FOSS **Neville J. 161**

4.—— *Unqualified Person—Money in Possession of Unqualified Person acting as Solicitor—Motion for Payment into Court — Summary Jurisdiction—Estoppel.*

In a debenture-holder's action against the company the property comprised in the debentures was sold by the plaintiff and receiver under an order of the Court which directed that the purchase-money should be lodged in Court. The purchase-money was in fact received by E., the solicitor on the record acting for the plaintiff. It was not paid into Court, but found its way into the hands of one J., an unqualified person, who paid it into his own banking account. J. was associated in business with E., who paid him 1*l.* a week for the use of his offices. J. introduced business which was transacted by E., J. paying out of pocket expenses and participating in the profits of the business introduced by him. Among the business so introduced was the conduct of the action. All payments and receipts passed through J.'s banking account, upon which E. had no authority to draw. Proceedings to recover the purchase-money from E. having failed, the plaintiff moved before Eve J. for a seven-day order upon J. to lodge it in Court. Upon the hearing of the motion it was objected that the Court had no jurisdiction to make a summary order against him.

Eve J. held that J. had assumed the privileges of a solicitor, and carried on legal proceedings as an officer of the Court, and was therefore amenable to the summary jurisdiction:—

Held by the Court of Appeal, on the evidence, that J. had not obtained possession of the purchase-money by holding himself out as a solicitor, and that the Court could not therefore treat him as a solicitor, or a person holding himself out as such, and exercise their summary jurisdiction against him.

In re Hulm & Lewis [1892] 2 Q. B. 261, distinguished. *In re* HURST & MIDDLETON, LIMITED. MIDDLETON *v.* THE COMPANY **C. A. 520**

STATUTES:—

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14 Geo. 3, c. 78, s. 83—*Fires Prevention (Metropolis)* - - - - - **414**
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1796.

36 Geo. 3, c. 52, ss. 6, 12, 15, 17—*Legacy Duty*
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1799.

39 Geo. 3, c. 79, s. 2—*Unlawful Societies* - **371**
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57 Geo. 3, c. 19, s. 25—*Seditious Meetings* – 371
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16 & 17 Vict. c. 137, ss. 62, 66—*Charitable Trusts* 167
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1854.

17 & 18 Vict. c. 113, s. 1—*Real Estate Charges* 251
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1855.

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31 & 32 Vict. c. 40, s. 8—*Partition* – – 268
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34 & 35 Vict. c. 31, ss. 4, 8, 16—*Trade Union* 371
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1874.

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39 & 40 Vict. c. 17, s. 6—*Partition* – – 268
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39 & 40 Vict. c. 22, ss. 3, 4—*Trade Union* – 371
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1881.

44 & 45 Vict. c. 41, s. 3, sub-s. 3—*Conveyancing and Law of Property* – – 141
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54 & 55 Vict. c. 8, s. 1; s. 10, sub-s. 2—*Tithe* 318
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5 Edw. 7, c. 15, s. 9, par. (5.); ss. 9, 44—*Trade Marks* – – – – – 32
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6 Edw. 7, c. 47, s. 5, sub-s. 2—*Trade Disputes*
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7 Edw. 7, c. clxxi., ss. 8, 13—*Metropolitan Water Board* (*Charges*) – – – 546
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8 Edw. 7, c. 69, ss. 45, 46, 120—*Companies* (*Consolidation*) – – – – 438
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9 Edw. 7, c. 49, ss. 1, 2, 30; Sched. V., Form (E.), clause 7—*Assurance Companies* – 581
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10 Edw. 7, c. 8, s. 27, sub-ss. 1, 2, 5—*Finance*, 1909–10 – – – – – 357
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1 & 2 Geo. 5, c. 55, s. 1, sub-ss. 1, 3; s. 66, sub-s. 1 (iii.); First Schedule, Part I. (*a*) —*National Insurance* – – 563
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TITHES—*Bankruptcy of Incumbent—Sequestration of Benefice—Recovery of Tithes paid by Mistake of Fact—Liability of Bishop—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 52—*Tithe Act*, 1891 (54 & 55 *Vict. c.* 8), *s.* 1; *s.* 10, *sub-s.* 2.

Tithes paid under a mistake of fact to the sequestrator of a benefice appointed by an order made by the bishop under s. 52 of the Bankruptcy Act, 1883, are recoverable from the bishop as the party responsible for the execution of the sequestration, even although they have been paid over to the trustee in bankruptcy of the incumbent of the benefice before any demand for repayment is made. BAYLIS *v.* BISHOP OF LONDON – – – – **Neville J. 318**

TITLE—Vendor and purchaser.
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TRADE MARK—*Registration—Special Application—Surname*—"*Boardman's*"—"*McEwan's*"—"*Distinctive Mark*"—"*Adapted to distinguish*"—*Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* (5.); *ss.* 9, 44.

The mere surname of an individual, although it may be "adapted to distinguish" the goods of all the persons, taken collectively, who bear that surname from the goods of other persons bearing a different surname, is not "adapted to distinguish" the goods of a particular applicant, even though his surname be an uncommon one, from those of other persons within the meaning of that expression in the Trade Marks Act, 1905, and ought not therefore to be registered under paragraph (5.) of s. 9 of the Act. *In re* R. J. LEA, LIMITED'S APPLICATION. *In re* WILLIAM MCEWAN & CO., LIMITED'S APPLICATION
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TRADE UNION—*Rules—Expulsion of Member—Ultra vires—Injunction—Illegal Association—Branches—Delegates—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 4, 8, 16—*Trade Union Act*, 1876 (39 & 40 *Vict. c.* 22), *ss.* 3, 4—*Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 5, *sub-s.* 2

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—*Unlawful Societies Act*, 1799 (39 *Geo.* 3, *c.* 79), *s.* 2—*Seditious Meetings Act*, 1817 (57 *Geo.* 3, *c.* 19), *s.* 25—*Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *s.* 32.

The Act 39 Geo. 3, c. 79, after prohibiting certain societies, enacts (s. 2) that every society composed of different divisions or branches acting in any way separately or distinct from each other and having separate or distinct officials shall be deemed to be an unlawful combination or confederacy; and the Act 57 Geo. 3, c. 19, after prohibiting certain societies, enacts (s. 25) that every society which nominates or appoints delegates to meet and confer with any other society, or with any delegate of such other society, shall be deemed to be an unlawful combination or confederacy:—

Held, that although modern trade unions having branches and appointing delegates came within the scope of the said Acts of George III., and were not expressly exempted from those Acts by any subsequent Act, their existence had been recognized by the Legislature in the Acts relating to trade unions, and they must be deemed to be impliedly exempt from the provisions of the said Acts of George III.

The defendant association was registered under the Trade Union Acts, 1871 and 1876, and consisted of numerous lodges or branches. Each lodge elected its own officials and managed its own affairs and appointed delegates to meet and confer with delegates of kindred societies. The plaintiff alleged that he was a member of the association, that a resolution of its council purporting to expel him was ultra vires, and claimed an injunction to restrain the association and its officials from acting on the resolution. The association denied that the plaintiff was a member, and alleged that it had power under its rules to pass the resolution, which was valid; and also pleaded that it was an unlawful combination and confederacy within the meaning of the said Acts of George III.:—

Held, that the plaintiff was a member of the association, that the resolution was ultra vires, and that the association was exempt from the provisions of the Acts of George III.

An injunction was accordingly granted. LUBY *v.* WARWICKSHIRE MINERS' ASSOCIATION - - - - - **Neville J. 371**

TRUSTEE—Increment value duty—Settled land—Duty to check valuations for protection of estate—Discretion - **357**
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VALUATION—Increment value duty—Settled land—Duty to check valuations for protection of estate—Owner—Tenant for life - - - - - **357**
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VALUATION (METROPOLIS) ACT, 1869 - 546
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VENDOR AND PURCHASER—*Contract—Title to commence with Devise in* 1842—*Abstract from* 1842 *shewing Ouster of True Owner in* 1874—*Subsequent Good Possessory Title in Vendor—Title forced on Purchaser—Statute of Limitations—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34—*Effect of.*

Where a vendor contracts to give a title commencing with a certain instrument, and it afterwards appears that he cannot give such a title, but can give a good possessory title from a later date, the possessory title will be forced upon the purchaser.

A contract for the sale of land in 1911 provided that the title should commence with a general devise contained in the will of a testator who died in 1842 and whose seisin was to be assumed. The vendor in fact derived title from a disseisor who, in 1874, under a mutual mistake as to the effect of the will, was allowed by the true owner, who was under no disability, to take possession of the land and title deeds. The disseisor and those claiming under her down to the vendor remained in uninterrupted possession to the date of the contract. The mistake was not realized at the date of the contract, so the fact that the title was partly possessory was not mentioned therein. The purchaser took out a summons for a declaration that the vendor had not shewn a good title in accordance with the contract. The vendor claimed to have shewn a good title up to 1874, and a good possessory title since that date:—

Held by the Court of Appeal (Cozens-Hardy M.R. and Buckley L.J., Fletcher Moulton L.J. dissenting), that the vendor had shewn a good title and that it could be forced on the purchaser.

Decision of Swinfen Eady J. [1912] 1 Ch. 2, affirmed.

Games v. *Bonnor* (1884) 54 L. J. (Ch.) 517, followed.

Effect of s. 34 of the Real Property Limitation Act, 1833, explained.

VENDOR AND PURCHASER—*continued.*

Observations of Lord St. Leonards in *Scott* v. *Nixon* (1843) 3 D. & War. 388, 407, commented on. *In re* ATKINSON AND HORSELL'S CONTRACT **C. A. 1**

2. —— *Leasehold Property—Open Contract to sell—Breaches of Lessee's Covenants—Receipt for Rent—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 4.

Mortgagees by assignment of leasehold property agreed to sell it for the residue of the term. The contract provided that the property was sold subject to the covenants and conditions contained in the lease and to the rent thereby reserved, and that the assignment to the purchaser should contain a covenant indemnifying the vendors against the rent and covenants. At the time when the contract was entered into there were continuing breaches of the lessee's covenants to repair and paint (which were not usual covenants) in respect of which the lessors were threatening proceedings, but neither the vendors nor the purchaser knew or had notice of the breaches, and the purchaser did not know the nature of the covenants :—

Held, (1.) that the contractual provision above mentioned only meant that when the purchaser obtained his assignment he should take subject to the rent and covenants and should indemnify the vendors against payment of rent and performance of covenants in the future—not that he was to pay arrears of rent or make good breaches of covenants in the past; and (2.) that as the purchaser had shewn breaches of covenant, s. 3, sub-s. 4, of the Conveyancing Act, 1881, did not require the purchaser to assume that all the covenants in the lease had been performed.

Barnett v. *Wheeler* (1841) 7 M. & W. 364; *In re Highett and Bird's Contract* [1903] 1 Ch. 287; and *In re Allen and Driscoll's Contract* [1904] 2 Ch. 226, distinguished.

In re TAUNTON AND WEST OF ENGLAND PERPETUAL BENEFIT BUILDING SOCIETY AND ROBERTS' CONTRACT – **Parker J. 381**

3. —— *Restrictive Covenants — Building Plans to be approved by Vendor's Surveyor—Costs of Approval—Construction of Conveyance—Custom.*

A conveyance of part of an estate at Reading contained a covenant by the purchasers not to erect any building otherwise than in accordance with such drawings and specifications as might be previously approved of in writing by the vendor's surveyor :—

Held, on the construction of the conveyance, that the purchasers were not liable to pay the fees of the vendor's surveyor for approving the plans.

Held, also, on the evidence, that an alleged general custom that the purchasers should pay the surveyor's fees in such cases did not extend to Reading, and it was doubtful whether it obtained even in London. READING INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED *v.* PALMER – – – **Swinfen Eady J. 42**

4. —— *Settled Land—Contract for Sale—Document prior in Date to Commencement of Title—Sale by Tenant for Life—Land in Ireland—Order of Court in Ireland appointing Trustees — Purchase of Land in England — Capital Moneys—Purchaser's Right to inquire into Source of—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 2, *sub-s.* 2—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 3—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 38, 65.

The vendor contracted to sell land in England under a contract fixing the commencement of title in 1874 and stating that he was selling as tenant for life under his statutory power under the Settled Land Acts. The settlement in question was a compound settlement created by several instruments, some of which, including a will made in 1836, were dated or made prior to the time fixed for the commencement of title, and the last of which was a resettlement made in 1902. The vendor had, however, voluntarily furnished an abstract of all the earlier documents constituting the compound settlement except the will of 1836, which was recited in one of these documents dated in 1860.

The compound settlement originally comprised land in Ireland alone, and by an order of the High Court of Justice in Ireland, made in 1908, the present trustees were appointed trustees of the compound settlement for the purposes of the Settled Land Acts. In 1910 the land in England, the subject of the contract, was conveyed to the trustees and their heirs to the uses, upon the trusts, and subject to the powers, charges, and provisions to, upon, and subject to which under the compound settlement the freehold lands therein comprised stood limited. The conveyance contained a statement to the effect that the purchase was made at the direction of the tenant for life out of capital moneys in the hands of the trustees arising under the compound settlement :—

Held, that the purchasers were precluded by the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 3, from requiring production of the probate of the will of 1836 or an abstract or copy thereof.

Held, also, that under the order of the Court in Ireland the trustees were in the position of trustees of the settlement for the purposes of the Settled Land Acts in relation to the subsequently acquired land in England without being reappointed by the Court in England.

Held, also, that the purchasers were not entitled to go behind the statement in the conveyance or to require other evidence that the purchase-moneys arose from the sale of land in Ireland subject to the compound settlement.

In re EARL OF ARRAN AND KNOWLESDEN & CREER'S CONTRACT – – **Warrington J. 141**

WATER — *Rates — Metropolis — Quinquennial Valuation — Provisional List — Supplemental List—"In force at the commencement of the quarter"—Metropolitan Water Board (Charges) Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 13—*Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 43—47.

The defendant was the occupier of premises

WATER—*continued.*

called "The Brown Bear," in Aldersgate Street, London, E.C. These premises were, during the quarter from October 1 to December 31, 1910, and the preceding and succeeding quarters supplied with water by the plaintiffs.

In 1908 the valuation list for the parish of the city of London was altered by the making of a supplemental valuation list, in which the rateable value of the "Brown Bear" was shewn at 400*l.* This supplemental list came into force on April 6, 1909. On June 2, 1910, the overseers of the parish sent to the assessment committee, pursuant to s. 47 of the Valuation (Metropolis) Act, 1869, a provisional list, in which the "Brown Bear" was included at the reduced rateable value of 399*l.*, and on June 23, 1910, the committee's clerk served on the defendant, as occupier, a copy of so much of the provisional list as related to the "Brown Bear," with a notice specifying a day on or before which any objection to the list might be made. On October 3, 1910, the committee considered the provisional list and reduced the rateable value to 234*l.*, thereafter returning the list and a copy, after being dated on that day and signed by their clerk, to the overseers in accordance with s. 47 of the Act of 1869.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, payment for water supplied is to be at a rate per annum not exceeding 5 per cent. of the "rateable value" of the house or building in respect of which the supply is required. By s. 13 of the Charges Act "the rateable value . . . . for the purposes of this Act shall be determined by the valuation list in force at the commencement of the quarter for which the water rate accrues." The water rate is payable in advance, and by s. 15 the quarterly days for its payment are April 1, July 1, October 1, and January 1 in each year:—

Held by the Court (Farwell and Kennedy L.JJ., dissentiente Cozens-Hardy M.R.), that the provisional list came into force on June 23, 1910; that the "valuation list in force" on October 1, 1910, was therefore the supplemental list made in 1908, as altered by the provisional list; and that the defendant was liable to pay the rate payable on that date on the rateable value of 234*l.* instead of 400*l.*

Decision of Parker J. [1912] 1 Ch. 296, reversed. METROPOLITAN WATER BOARD *v.* PHILLIPS – – – – – **C. A. 546**

WAY, RIGHT OF—*Easement—Implied Grant of Right of Way—Plan of Lease—Alteration of Date of Lease after Execution—Alteration by Agreement—Estoppel—Building Agreement—Acceptance of Lease omitting Part of Land in Agreement.*

Defendant B. had granted to G. separate leases of four plots of land fronting on H. road and four houses which had been erected thereon by G. under a building agreement. The plan on each lease, which was made part of the description, shewed a row of twelve plots with houses thereon fronting on H. road, including the house demised which alone was coloured, and a strip of land coloured brown running past the back of all the plots to E. road. The position of

WAY, RIGHT OF—*continued.*

this strip on the plan suggested that it was intended to give access to the back of the plots, but there were no words on the plan expressing such an intention. This strip of land was included in the building agreement but not in the leases.

The leases were executed in May, 1903, and then bore no date except the year 1903, but the dates July 27, 28, 29, 30, 1904, respectively, were afterwards inserted by agreement between the parties. At the latter dates the houses had been completely erected and surrounded with a fence in which gates or openings had been made in the back fences giving access to and from the brown strip. This strip, which belonged to B., had never been fenced or marked off from the rest of B.'s land. The plaintiff was a mortgagee of G., who had entered into possession and claimed a right of way over the brown strip:—

Held, that the alteration of the leases did not make them void, but B. was estopped from denying that the leases were executed at the dates inserted in them with his consent; that the circumstances existing at those dates could be looked at in construing the lease and plan; and that an implied right of way over the brown strip was granted by the leases to the lessee and those claiming under him:—

Held, also, that by accepting the leases as executed G. had abandoned any right he had to a lease of the strip coloured brown. RUDD *v.* BOWLES – – – – – **Neville J. 60**

—— Railway company — Extinguishment of public rights — Compulsory powers — Land acquired by agreement – **110**
See HIGHWAY. 2.

WIDOW OR WIDOWER—Gift in case of being a, at period of distribution—Will—Construction – – – – **386**
See WILL. 7.

WIFE.
See HUSBAND AND WIFE.

WILL—*Annuity—Charge on Income or Capital—Trust to pay out of Income—Gift of Corpus "subject to the said annuities"—Will—Construction.*

A testator gave his real and personal estate to trustees, upon trust for sale and investment, and to hold the investments in trust, out of the income thereof, to pay two annuities to the annuitants for their respective lives, and upon further trust to accumulate the residue of the income until the youngest child of J. should attain the age of twenty-one years, or until the expiration of twenty-one years from the testator's death, whichever should first happen, and after the attainment of the age aforesaid by the youngest child of J. or the expiration of the term, which should first happen, the testator directed his trustees to hold the trust fund and accumulations, "subject nevertheless to the said annuities," in trust for the children of J. then living and the children of any deceased children per stirpes. The will also empowered the trustees to apply the income of the share of a child or grandchild of J. in the trust fund or the

WILL—*continued.*

accumulations thereof, "subject to and after payment of the annuities," for or towards the maintenance of the child or grandchild, and, "subject to providing for the said annuities," to raise a part of the expectant, presumptive, or vested share of a child or grandchild in the trust fund and the accumulations, and to pay or apply the same for his benefit :—

Held, that, notwithstanding the direction to accumulate the residue of the income, the annuities were a charge upon the corpus.

Taylor v. *Taylor* (1874) L. R. 17 Eq. 324, must be taken to have been overruled by *In re Howarth* [1909] 2 Ch. 19.

Quære, whether there is any difference between a charge on corpus and a continuing charge on income. *In re* YOUNG. BROWN *v.* HODGSON - - - - **Parker J. 479**

2.——*Charitable Legacies—Will made after Mortmain and Charitable Uses Act*, 1891—*Usual Direction for Payment in use prior to that Act—Effect of—Direction to pay certain Legacies "after payment" of others—Priority of Payment—Will—Construction.*

Testator by his will, made after the passing of the Mortmain and Charitable Uses Act, 1891, gave his real and personal estate to trustees upon trusts for sale and conversion, and out of the proceeds "in the first place" to pay all expenses incident to the execution of the trusts and powers of his will and his debts and funeral and testamentary expenses; and "in the next place" to pay a legacy of 500*l.* free of duty to each of seven named nephews, and "after payment thereof" to pay a legacy of 1000*l.* to each of nine named nieces, with a substitutional gift to their children in case any of them should die in his lifetime. He then bequeathed certain other legacies, including eleven charitable legacies, and directed these charitable legacies "to be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes and in preference to any other payments thereout." The testator's estate comprised real and leasehold property and impure personalty :—

Held, that the direction as to the payment of the charitable legacies must be read as a direction to pay them out of the whole personal estate (including leasehold property) not specifically bequeathed, to the exclusion of the real estate, but in priority, so far as the personal estate went, to all other payments thereout.

In re Bridger [1894] 1 Ch. 297, applied.

Held, also, that the legacies bequeathed to the nephews were not entitled to priority over the legacies bequeathed to the nieces.

Thwaites v. *Foreman* (1844) 1 Coll. 409, followed. *In re* HARRIS. HARRIS *v.* HARRIS **Warrington J. 241**

3.——*Class Gift after Life Estate—Class to be ascertained at Testator's Death—Gift over to "Survivors"—Survivorship referring to Period of Distribution—Will—Construction.*

Testator devised and bequeathed all his real and personal estate to his wife for life and then made the following disposition :—"and from

WILL—*continued.*

and after her decease upon trust to divide my trust estate equally between my children as hereunto described"—naming eight—"and all others born under wedlock (if any)." The last clause in the will provided as follows : "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors."

The eight named children survived the testator, but one of them died in the widow's lifetime leaving children :—

Held, that inasmuch as the original gift to the testator's children was a gift to a class to be ascertained at the testator's death, the final direction must apply to the death of a member of that class during the lifetime of the widow, otherwise it would be meaningless; and that only those children who survived the widow were entitled to share in the testator's estate.

Cripps v. *Wolcott* (1819) 4 Madd. 11, applied.

Decision of Joyce J. [1912] 1 Ch. 245, reversed. *In re* POULTNEY. POULTNEY *v.* POULTNEY - - - - - **C. A. 541**

4.——*Condition Subsequent—Public Policy—Condition against Children living with or under the Control of their Father—Will—Construction.*

Three fourths of a testatrix's residuary estate were given upon trust to pay the income to her two grandchildren up to December 31, 1927, and then to divide the corpus between them. In case either grandchild should die before that date without leaving lawful issue his or her share was given to other persons, and the will then contained a declaration that if at any time on or before December 31, 1927, either one or both of the grandchildren should "live with or be or continue under the custody, guardianship or control of their father . . . . or be in any way directly under his control, all benefits, profits and income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control." In case of forfeiture of the interest of a grandchild under this condition his or her forfeited share was to be held upon the trusts declared on the happening of the death of the grandchild before December 31, 1927, without leaving lawful issue :—

Held, (1.) that the clause was a condition in defeasance of an interest previously given; (2.) that it was void as being contrary to public policy, because it was inserted with the object of deterring the father from performing his parental duties, and also because it was an attempt to interfere with the discretion of the Court as to the custody and maintenance of its wards; and (3.) that the condition was bad on the ground of uncertainty. *In re* SANDBROOK. NOEL *v.* SANDBROOK - - **Parker J. 471**

5.——*Devise of Mortgaged Property—Trust for Sale reserving Rent-charges—Payment of*

Mortgage Debt — Deficiency — Liability of Residuary Estate—Marshalling—Real Estate Charges Act, 1854 (17 & 18 *Vict. c.* 113), *s.* 1.

A testator devised property, which was subject to mortgages at the date of his will and death, on trust for sale, rent-charges of specified amounts to be created and reserved thereout for the benefit of daughters and their families. The property was insufficient for creation of the rent-charges and payment of the mortgage debts. There was no "contrary or other intention" signified by the testator within the meaning of Locke King's Act :—

Held, on the principle of marshalling, that the rent-chargees were entitled to have the property sold, reserving the rent-charges, any deficiency of the proceeds for satisfaction of the mortgage debts to be made good out of the general personal estate.

Buckley v. *Buckley* (1887) 19 L. R. Ir. 544, followed and applied. *In re* FRY. FRY *v.* FRY

Joyce J. 86

6.—— *Equitable Limitations — Fee Simple determinable on Bankruptcy, &c.—Executory Devise—"Male heir of the body"—Failure of Issue—Will—Construction.*

Testator appointed trustees and executors of his will and devised certain real estate upon trust to pay the annual income arising therefrom unto his nephew, the plaintiff, until he should assign, charge, or otherwise dispose of the same or become bankrupt, which of the said events should first happen, and if the trusts thereinbefore declared should determine in the lifetime of the plaintiff to accumulate at compound interest for the benefit of the male heir of his body till he attained the age of twenty-one years, and should he die without leaving a male heir, then the testator directed his trustees to apply the annual income to the plaintiff's brothers and the respective male heirs of their bodies successively according to seniority in tail, with remainder to the plaintiff's sisters as tenants in common.

Upon a summons by the plaintiff, to which the remaindermen, the plaintiff's infant son, and the heiress-at-law of the testator were defendants, for the determination of the quantum of the estate taken by him :—

Held, but without prejudice to any claim which after the plaintiff's death his heir male or the heir male of his body might make, that the plaintiff took an equitable estate in fee simple determinable on the happening of any of the specified events, which estate would on his death without the happening of any of those events become an absolute estate in fee simple, but subject to the executory limitations over to the remaindermen if the plaintiff should die without leaving any male heir of his body at the time of his decease. *In re* LEACH. LEACH *v.* LEACH

Joyce J. 422

7. —— *Gift in Case of being a Widow or Widower at Period of Distribution—Death of Widow before that Period—Survival of Male Donee and his Wife—Will—Construction.*

Testator gave his residuary estate upon trust for conversion and investment, and out of the income to pay an annuity to his wife for life, and an annuity to his sister M., provided she should be a widow at his death, until her remarriage or the death of his wife. He then directed the surplus income to be accumulated, that the accumulations should be applied as part of his residuary estate, and that on his wife's death the trustees should set apart certain legacies, including 1000*l.* to testator's sister M. provided she should be a widow at testator's wife's death, but in the event of M. then being a wife, in trust for her children equally. The ultimate residue after payment of these and other legacies was to be held in trust for such of certain named persons, including J. and M., as should be living at testator's wife's death. Then followed a proviso that the share of J. in the residue was subject to his being and only to be paid to him if he should be a widower at testator's wife's death, and that the share of M. was subject to her being and only to be paid to her if she should be a widow at testator's wife's death, and that the share of J. if not a widower and the share of M. if not a widow at testator's wife's death should go to D. and F., children of M. M. never remarried, but died before testator's wife. J. and his wife and D. and F. all survived the testator's wife :—

Held, (1.) that J.'s share of residue went to D. and F. ; (2.) that M.'s share of residue did not go to D. and F., as she was then dead ; and (3.) that the legacy of 1000*l.* to M. was contingent on her being alive at testator's wife's death, and therefore failed.

In re Whitmore [1902] 2 Ch. 66 ; *Davies* v. *Davies* (1882) 30 W. R. 918 ; and *Brock* v. *Bradley* (1864) 33 Beav. 670, distinguished. *In re* LAING. LAING *v.* MORRISON

Parker J. 386

8. —— *Nearest of Kin of Deceased Husband and Wife, Gift to—Will—Construction.*

M. S., the testatrix, was the widow of W. S., who had previously been married to S. S. There was one son by the marriage of W. S. and M. S., but no issue of the former marriage. M. S. by her will gave leasehold property to the son for life, and after his decease to his lawful issue equally. In the event of his death without leaving a lawful child (which event happened) she gave the property to "the nearest of kin of my late husband W. S. and of S. S., his former wife, deceased, in equal shares and proportions." As far as was known W. S. and S. S. were not relations before marriage. S. S. left next of kin :—

Held, that the gift was to a class consisting of the nearest of kin of W. S. and the nearest of kin of S. S., and not to a class consisting of persons who were nearest of kin to both of them.

Pycroft v. *Gregory* (1829) 4 Russ. 526, distinguished. *In re* SOPER. NAYLOR *v.* KETTLE

Parker J. 467

9. —— *Reading "or" as "and"—Gift over—Will—Construction.*

A testator gave two freehold houses to S. for her own use and disposal, "subject only to the following conditions, viz. in the event of the said

WILL—*continued.*

S. dying intestate or childless or under the age of twenty-one (but not otherwise) the said two houses and premises shall become the property of" M.

S. survived the testator, attained the age of twenty-one years, and died a spinster intestate:—

Held, that a gift over in the event of the first absolute taker dying intestate and childless was void for repugnancy; that the first or the second "or" must be read as "and"; and that on this construction S. took absolutely and the gift over failed. *In re* CRUTCHLEY. KIDSON *v.* MARSDEN - - - - **Parker J. 335**

10. —— *Realty — Devise—Life Estate—Remainder to "my nearest male heir" — "My nearest and eldest male relative"—No Male Heir —Heiress-at-Law—Intestacy— Will — Construction.*

The testator, a bachelor, devised real estate to a trustee and his heirs in trust to pay the rents and profits to H. H. M. for life and after his decease to convey, assign, and assure the same "unto my nearest male heir and should there be two or more in equal degrees of consanguinity to me then I direct the said" trustee "to convey assign and assure the same unto the eldest of my male kindred for the term of his natural life with remainder to the heirs of the body of my eldest male relative." The testator bequeathed the residue of his personal estate to his trustee in trust for H. H. M. for life, expressing a desire that he should no mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value "and keeping up the remainder in trust for my nearest and eldest male relative" who should be such at the death of H. H. M.

The defendant Mrs. W. was the heiress-at-law of the testator both at his death and the death of H. H. M.

The nearest male relative of the testator at the time of his death was the son of a female first cousin, and at the time of H. H. M.'s death was the son of a daughter of the same cousin:—

Held, that the person to whom the real estate was to be conveyed on H. H. M.'s death must possess three qualifications, namely, he must be (1.) a male, (2.) testator's heir, and (3.) testator's nearest male heir; that in devising to his nearest male heir the testator could not in the circumstances have contemplated any heir of his own body, and must be taken to have meant his heir general, in which case it was well settled that the gift was a gift to his heir being a male; and that as neither at his death nor at the death of H. H. M. was the testator's heir a male, the devise failed, and the testator's heiress-at-law was entitled. *In re* WATKINS. MAYBERY *v.* LIGHTFOOT - **Joyce J. 430**

11. —— *Residuary Estate—Tenant for Life —"Rents, issues and profits"—Leaseholds — Enjoyment in Specie—Conversion— Will — Construction.*

A testator gave the residue of his real and personal estate to trustees upon trust to permit his wife to receive the rents, issues and profits from his said real and personal estate during her

WILL—*continued.*

life, and after her decease he gave the residue of his said real and personal estate, whatsoever the same might then consist of and wherever the same might be, to two persons equally to be divided between them. The residuary estate included both freehold and leasehold property:—

Held, following *In re Game* [1897] 1 Ch. 881, that the rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137a, must be applied, and that the widow was not entitled to the whole of the rents and profits of the leaseholds, but was only entitled annually to a sum equal to the dividends which would be produced if the leaseholds had been sold a year after the testator's death and invested in Consols.

Decision of Neville J. affirmed.

Harris v. *Poyner* (1852) 1 Drew. 174; *Craig* v. *Wheeler* (1860) 29 L. J. (Ch.) 374; and *In re Game* approved.

Crowe v. *Crisford* (1853) 17 Beav. 507; *Wearing* v. *Wearing* (1856) 23 Beav. 99; *Vachell* v. *Roberts* (1863) 32 Beav. 140; and *In re Elmore's Will* (1860) 9 W. R. 66, overruled. *In re* WAREHAM. WAREHAM *v.* BREWIN **C. A. 312**

12.——*Specific Gift of Foreign Property— Executors and Trustees—Assent of Executors— Costs of Realization—French Succession Duty— Power—Divisibility—Perpetuity.*

Testatrix, who was domiciled and died in England, by her will appointed C. and D. executors, and gave all her real and residuary personal estate, except her shares in a certain French company, to "the said C. and D. (hereinafter called 'my trustees')" upon trust for sale, and to hold the net proceeds, after payment of her debts and funeral and testamentary expenses, upon trust to pay a certain charitable legacy, and to divide the residue into thirteen parts, as to eleven of them upon certain trusts, "and as to two other of such parts upon trusts to pay the capital or income thereof, or neither, to my nephew E., or to apply the capital or income thereof, or any part of either, for his benefit, or for the benefit of his wife or any child or children of his as my trustees may in their absolute and uncontrolled discretion consider desirable." And she gave all her twenty-one shares in the French company "to my trustees" upon trust to sell or retain the same and to hold the same upon trust for certain persons. Seven of the shares were charged with the payment of certain legacies.

Shortly after the testatrix's death the trustees sold some of the shares, and applied the proceeds in paying a legacy charged by the will on seven of the shares. In completing their title according to French law the trustees paid certain sums claimed by the French Government by way of succession duty, and in so doing, and also in connection with the realization of the shares, they incurred certain costs:—

Held, (1.) that the trustees, being also executors, must as such have assented to the gift of the shares to themselves, and, after such assent, were entitled to the shares as trustees and not as executors, and that the French duty and costs must be borne by the shares, and not by the general estate.

WILL—*continued.*

In re Brewster [1908] 2 Ch. 365, followed *Perry* v. *Meddowcroft* (1841) 4 Beav. 197, doubted.

A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void, but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule. If a power be given to a person alive at the date of the instrument creating it, it must, of course, if exercised at all, be exercised during his life, and is therefore valid. If a power can be exercised only in favour of a person living at the date of the instrument creating it, it must, if exercised at all, be exercised during the life of such person, and is therefore unobjectionable.

The instrument itself may expressly limit a period, not exceeding the legal limits, for the exercise of the power. And where the settlor has used language from which the Court may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the Court will avoid the latter only and will give effect to the power which is not open to this objection. Thus, although a power vested in the trustees for the time being of a settlement has apparently been uniformly looked on as a single and indivisible power, it may be otherwise if the power be limited to A. and B. or other the trustees of the settlement for the time being. In this case the Court may treat the settlor as having created one power vested in A. and B. while trustees, and a distinct power vested in their successors, in which case the power vested in A. and B. would be open to no objection on the ground of remoteness: *Attenborough* v. *Attenborough* (1855) 1 K. & J. 296.

Held, therefore, (2.) that the power or powers created in favour of E., his wife and children, were conferred on the trustees of the will for the time being, and not on the original trustees only (see *In re Smith* [1904] 1 Ch. 139); and that the principle of *Attenborough* v. *Attenborough* (ubi supra) was inapplicable.

Held, also, (3.) that if one power only was vested in these trustees, it might, according to the true construction of the will, be exercised during the life of any child of E. whether alive at the testatrix's death or born afterwards, and was therefore avoided by the rule against perpetuities.

Held, (4.) that there were two powers vested in the trustees for the time being of the will, first to pay either capital or income to E., which was only capable of being exercised during his life, and secondly a power to apply either capital or income for the benefit of E., his wife or children, which was capable of being exercised beyond the period allowed by law, and that the former power must be upheld and the latter rejected. *In re* DE SOMMERY. COELENBIER *v.* DE SOMMERY – – – **Parker J. 622**

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